Sup. Court U.S.
FILED
06-572 OCT 23 2006
OFFICE OF THE CLERK

No._____

*IN THE*
*SUPREME COURT OF THE UNITED STATES*

**FRANCISCO CHAVEZ AYON,**

**Petitioner,**

**v.**

**DEPARTMENT OF CORRECTIONS,**

**Respondent.**

***On Petition For Writ of Certiorari***
***To the United States Court Of Appeals***
***For The Ninth Circuit***

# PETITION FOR WRIT OF CERTIORARI

**PHILIP A. DeMASSA**
***Counsel of Record***
**PHILIP A. DeMASSA, APC**
**2356 Moore Street, Suite 201**
**San Diego, CA 92110**
**(619) 294-2777 Telephone**
**(619) 294-2120 Facsmile**
***Attorney for Petitioner***

## QUESTIONS PRESENTED

1. Is petitioner entitled to a Certificate of Appealability when he has made a facial constitutional claim that his rights to remain silent and not incriminate himself were violated when, after being detained in a house he was visiting and having his freedom of action deprived in a significant way by six officers and not being advised of his rights, was interrogated and made incriminating statements?

2. Is petitioner entitled to a Certificate of Appealability when, after the first illegal interrogation he was provided a defective *Miranda* warning in Spanish which told him he had no right to refuse to speak to the officers and thereafter made incriminating statements?

3. Is petitioner entitled to a Certificate of Appealability when he made a facial constitutional claim that his trial counsel was ineffective in failing to investigate the available co-defendants who would testify that he was not a participant in their criminal activity and he was not a person who was intercepted on a wire tap?

4. Is petitioner entitled to a Certificate of Appealability when he made a facial constitutional claim that his trial counsel was ineffective in failing to move to suppress or otherwise exclude or limit the consideration of extremely prejudicial other crimes evidence which the prosecution used to label him a major cocaine distributor selling millions of dollars of narcotics?

5. Is petitioner entitled to a Certificate of Appealability when his core defense was denied him that his trial counsel was ineffective in failing to call a voice expert who would testify that he was not the person (Pancho) who was intercepted on wire taps and implicated in the drug conspiracy?

6. Is petitioner entitled to a Certificate of Appealability when he has established numerous professional errors of his trial counsel and they are not considered cumulatively as this Court has required when making a determination of prejudice under applicable Supreme Court law?

## PARTIES TO THE PROCEEDINGS

Petitioner (appellant below) is Francisco Chavez Ayon.

Respondent is the Department of Corrections for the State of California.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. . . . . i

PARTIES TO THE PROCEEDINGS. . . . . iii

TABLE OF AUTHORITIES. . . . . ix

PETITION FOR WRIT OF CERTIORARI. . . . . 1

CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE. . . . . 1

JURISDICTION. . . . . 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. . . . . 2

STATEMENT OF THE CASE. . . . . 2

1. State Trial Court Trial Proceedings. . . . . 2

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW. . . . . 7

1. Petitioner was denied a fair trial when his statements, obtained by the police in violation of *Miranda*, were admitted at trial. . . . . 7

2. Trial counsel was ineffective which prejudiced petitioner's defense. . . . . .8

REASONS WHY THE WRIT SHOULD BE GRANTED. . . . . 10

I. PETITIONER IS ENTITLED TO A CERTIFICATE OF APPEALABILITY ON EACH CLAIM PRESENTED. . . . . 10

II. PETITIONER MADE A FACIAL CONSTITUTIONAL SHOWING THAT STATEMENTS WERE OBTAINED FROM HIM IN VIOLATION OF *MIRANDA* WHICH DENIED HIM A FAIR TRIAL. . . . . 11

A. The first statement. . . . . 11

B. The second statement. . . . . 15

III. PETITIONER MADE A FACIAL CONSTITUTIONAL SHOWING THAT HIS TRIAL COUNSEL WAS INEFFECTIVE. . . . . 17

A. Trial counsel failed to investigate and call available witnesses who would have exculpated petitioner and explained that

**he was not Pancho and was at the house for lawful reasons. . . . . 17**

**B. Trial counsel failed to object to the introduction of prejudicial other crimes evidence the prosecution used to show petitioner was a major narcotics distributor which tied him into the conspiracy. . . . . 22**

**CONCLUSION. . . . . .29**

**APPENDIX** **APP.**

Chavez-Ayon v. Department of Corrections, No. 05-56732, United States Court of Appeals for the Ninth Circuit, Order Denying Request for Certificate of Appealability, dated July 25, 2006. . . . . 1

Chavez-Ayon v. Department of Corrections, No. CV- 02-5564-NS(RNB), United States District Court Central District of California, Order Denying Motion for Certificate of Appealability, dated November 10, 2005. . . . . .2

Chavez-Ayon v. Department of Corrections, No. CV-025564-NS(RNB), United States District Court Central District of California, Order Adopting Findings, Conclusions and Recommendations of United States Magistrate Judge, dated August 22, 2005. . . . . 4

Chavez-Ayon v. Department of Corrections, No. CV-02-5564-NS(RNB), United States District court Central District of California, Report and Recommendation of United States Magistrate Judge, dated April 11, 2005. . . . . 9

Chavez-Ayon v. Department of Corrections, No. 05-56732, United States Court of Appeals for the Ninth Circuit, Motion for Certificate of Appealability, dated December 14, 2005. . . . . .137

Chavez-Ayon v. Department of Corrections,
No. BA127531, Court of Appeal of the
State of California-Second Appellate District
Division Three, Appeal from a Judgment of the
Superior Court of Los Angeles County, Maureen
Duffy-Lewis, Judge. Affirmed as Modified. . . . . 161

Constitutional Provisions, Statutes,
Federal Rules. . . . . .192

## TABLE OF AUTHORITIES

FEDERAL CASES — Page

*Barefoot v. Estelle*, 463 U.S. 880 (1983). . . . . .10, 11

*Berkemer v. McCarthy*, 468 U.S. 420 (1984). . . . . 14

*Clevis v. Texas*, 386 U.S. 707 (1967). . . . . 16

*Crane v. Kentucky*, 476 U.S. 683 (1986). . . . . .10, 20, 28

*Elkins v. United States*, 364 U.S. 206 (1960). . . . . 10, 23

*Glasser v. United States*, 315 U.S. 60 (1942). . . . . .22

*Holmes v. South Carolina*, 547 U.S. __,
126 S.Ct. 1727 (2006). . . . . 21, 28

*Jennings v. Woodford*, 290 F.3d 1006,
(9th Cir. 2002) *cert. denied*, 539 U.S. 958 (2004). . . . . 11

*Miller-El v. Cockrell*, 537 U.S. 322 (2003). . . . . 10, 11

*Miranda v. Arizona*, 384 U.S. 436 (1966). . . . . 7, 10, 13, 16

*Moran v. Burbine*, 475 U.S. 412 (1986). . . . . 16

*North Carolina v. Butler*, 441 U.S. 369 (1979). . . . . .16

*Oregon v. Elstad*, 470 U.S. 298 (1985). . . . . .14

*Pennsylvania v. Muniz*, 496 U.S. 582 (1990). . . . . 15

*Slack v. McDaniel*. 529 U.S. 473 (2000) . . . . . 10

*Stansbury v. California*, 511 U.S. 318 (1966). . . . . 13, 14, 15

*Strickland v. Washington*, 466 U.S. 668 (1984). . . . 9, 10, 21, 28

*Tennard v. Dretke*, 542 U.S. 902 (2004). . . . . .10

*Terry v. Ohio*, 392 U.S. 1 (1968). . . . . .15

*United States v. Hill*, 60 F.3d 672 (10th Cir.),
*cert. denied*, 516 U.S. 970 (1995). . . . . .23

*United States v. Janis*, 428 U.S. 433 (1976). . . . . 23

*United States v. Leon*, 468 U.S. 897 (1984). . . . . 23

*United States v. Perez-Castro*, 606 F.2d 251 (9th Cir. 1979). . . 23

*United States v. Medina*, 181 F.3d 1078 (9th Cir. 1999)
(Fletcher, J. dissent), *cert. denied*,
529 U.S. 1056 (2000). . . . . .23

*Washington v. Texas*, 388 U.S. 14 (1967). . . . . 10, 21, 28

STATUTES

28 U.S.C. § 1254(1). . . . . .2

28 U.S.C § 2253. . . . . 2

28 U.S.C. §2253(c)(2). . . . . .11

28 U.S.C. § 2254. . . . . .2

28 U.S.C. § 2254(d)(1)&(2). . . . . 13, 14

FEDERAL RULES OF
APPELLATE PROCEDURE

Rule 22(b). . . . . .2

CALIFORNIA EVIDENCE CODE

§ 352. . . . . 9, 25

§ 1101(b). . . . . .24

## PETITION FOR WRIT OF CERTIORARI

Francisco Chavez Ayon ("petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit denying petitioner a certificate of appealability regarding his writ of habeas corpus pursuant to Rule 10 of the Rules of the Supreme Court.. The denial was entered on July 25, 2006.

## CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE

The unpublished judgment of the Court of Appeals for the Ninth Circuit issued on July 25, 2005 denying petitioner a certificate of appealability is attached as Appendix ("App.") 1.

The unpublished order of the United States District Court for the Central District of California issued on November 10, 2005 denying petitioner's motion for certificate of appealability is attached as App. 2. The report and recommendation of the United States Magistrate Judge ("report") issued on August 11, 2005 is attached as App. 9.

The unpublished opinion of the California Court of Appeal, Second District, issued on December 19, 2000 is attached as App. 106.

## JURISDICTION

The Court of Appeal's judgment was entered on July 25, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). App. 194.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as well as the provisions of the federal habeas corpus statute concerning the issuance of certificates of appealability found in 28 U.S.C § 1254(1) and § 2253, the rules regarding writs of habeas corpus regarding state prisoners found in 28 U.S.C. § 2254, and Federal Rules of Appellate Procedure Rule 22(b). Those provisions are supplied in App. 194, et. seq.

## STATEMENT OF THE CASE

### 1. State Trial Court Trial Proceedings

In the fall of 1995, DEA intercepted several telephone communications via a federal wire tap on Rafael Alapizco, believed to be a major cocaine supplier. Alapizco used two houses in the Los Angeles County city of Bellflower to store cocaine. On November 3, a man in Mexico told Alapizco to get 300 kilograms of cocaine ready for Pancho, to whom he'd

earlier supplied 500 kilos two weeks earlier.[1] Alapizco said he had Pancho's telephone number. App. 108..

The unknown man later called Alapizco to say Pancho wanted "three" Alapizco called (213) 999-2958. A man identified as Pancho answered. Alapizco said he was the person with the maroon van from the other day. Pancho said he was waiting for a call from Mexico. Alapizco said he was calling on his behalf. A meeting was discussed. At 3:30 p.m. Alapizco called Pancho inquiring how long it would take for his people to arrive. Alapizco said they'd meet at 5:00 p.m. at the hamburger stand and leave the keys in the ashtray. The agents began surveilling a McDonald's restaurant in Lakewood. Alapizco called Pancho to say the meeting would be at 4:00 p.m. At 4 a maroon van left one of Alapizco's houses and went to the McDonald's. Roberto Ramirez drove the van to 2641 E. Jackson where it disappeared up a driveway. Forty minutes later Ramirez in the van drove away. Agents started surveilling that house. App. 109.

Between 10:20 and 10:30 a.m. on November 5 petitioner parked a car in front of 2641 E. Jackson and walked into the house. He was not carrying anything. App. 72. Between 10:40 and 10:50 a.m. Ramirez drove a gray Ford Tempo up the 2641 E. Jackson driveway out of sight. Ramirez drove away about 11:30 a.m. and

---

[1] None of the calls used words such as "cocaine" or "kilograms"; the DEA agent provided these interpretations.

police stopped him. The Tempo had 50 kilos of cocaine in dark bags in the trunk. App. 109-110.

At 11:45 a.m. Orange County deputy sheriffs Ortega and Garcia went to the front door of 2641 E. Jackson and confronted Petitioner who let them enter. A cell phone with the number (213) 999-2958 was on a couch. Officer McKnight walked up the driveway and found behind some trees and bushes a break and a makeshift gate in the wooden fence separating 2641 E. Jackson from the house next door. A pathway ran between the two houses. McKnight went to 2639 E. Jackson and found Juan Chavez Ayon, Jesus Lara and Jose Ontiveros in the living room and currency, a money counting machine and 450 kilos of cocaine in a bedroom. Garcia saw the items at 2639 E. Jackson and talked to its occupants, learning the cocaine came from the pathway. Juan Chavez Ayon denied being related to petitioner. App. 110.

Garcia went to 2641 E. Jackson where petitioner was being detained. Garcia told petitioner he was under arrest. Garcia provided a *Miranda* warning in Spanish. Petitioner denied knowing Ramirez or Juan Chavez Ayon. The car petitioner arrived in was registered to a residence on Domart Street. A search of Domart found items in the names of Ayon, Ramirez and Juan Chavez Ayon including airplane tickets to Las Vegas, and slot machine records showing an "in and out" amount of $800,000. App. 111.

A Spanish Professor, Ervie Pena, listened to the November 3 intercepted calls and a voice exemplar taken of petitioner while in a jail lockup. Pena said the voices were the "same". Wire tap monitor Chiu was present when petitioner provided the exemplar and said the voice was the same as on the November 3 intercepts. App. 111.

Petitioner's defense was that he was visiting 2641 E. Jackson and not involved in the illegal activity. Petitioner's girl friend Irlanda Soto went to 2641 E. Jackson on November 3 to meet with petitioner, staying until 9:30 a.m. Sunday morning November 5. When he failed to arrive, she left. Petitioner was the mother of petitioner's baby who accompanied her to the house. App. 111. Petitioner and Jose Garcia operated a sand transporting business in Compton. Garcia did not see petitioner with a cell phone. App. 112.

Petitioner was convicted of several narcotics-related charges involving the others arrested at the two E. Jackson Street residences. Before sentencing petitioner's new counsel learned of the availability of the former co-defendants who earlier pleaded guilty. Several of them-Ramirez, Larios, and Juan Chavez Ayon-provided declarations that petitioner was not involved in their illegal activities and was present at 2641 E. Jackson to visit petitioner's girl friend and their new baby. Further, Alapizco listened to petitioner's voice exemplar and an interpreter present at the federal prison with him submitted a declaration that Alapizco

did not believe petitioner was the Pancho with whom he had spoken on November 3, 1995. App. 44-45, 127.

Petitioner appealed his convictions alleging that he was interrogated after arrest in violation of *Miranda*, interrogated a second time after a clearly defective *Miranda* warning had been administered, that his trial counsel was ineffective in failing to interview and/or call as defense witnesses the now available co-defendants, that trial counsel was ineffective in failing to suppress or otherwise limit the damaging effect of evidence seized from his residence two years earlier which the prosecution argued showed petitioner was a major cocaine distributor, that trial counsel was ineffective in failing to submit to a voice expert petitioner's voice exemplar to compare it with the voice of Pancho on the November 3, 1995 tapes to scientifically establish that he was not in fact Pancho. App. 106-30.

The California State Court of Appeal affirmed petitioner's convictions, positing the question, while allowing prejudicial other crimes evidence to be considered by the jury: "It is undisputed that [petitioner] was found inside a house connected to a large scale cocaine trafficking operation. The question, therefore, became: What was [petitioner] doing there? Was he merely an innocent visitor as he claimed, or was he part of the drug operation?" App. 125. Petitioner was unable to answer this core question due to the admission of

evidence obtained in violation of his right to remain silent and his trial lawyer's ineffective representation.

## HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

This petition presents two issues and several sub-issues, each of which was raised in post-conviction proceedings.

1. **Petitioner was denied a fair trial when his statements, obtained by police in violation of *Miranda*, were admitted at trial.**

Petitioner objected to the admission at trial of two statements taken the day he was arrested. The first was obtained after numerous police entered the residence and detained him in a separate room for some time, questioning him for ten to fifteen minutes. The second statement was obtained after officers found cocaine in the adjacent residence, arrested petitioner and administered a defective Spanish *Miranda v. Arizona*, [384 U.S. 436 (1966)] warning. The magistrate's report denied petitioner's arguments. App. 24-36. The district court adopted the magistrate's report. App. 4.

2. **Trial counsel was ineffective which prejudiced petitioner's defense.**

Petitioner alleged he was denied due process and a fair trial because his trial counsel was ineffective when he a) failed to interview and call the legally available former co-defendants to explain his presence at 2641 E. Jackson; b) failed to keep from the jury prejudicial other crimes evidence by moving to suppress it, by objecting to its introduction under the Confrontation Clause, to exclude it by seeking a balancing test, or by moving that its admission be accompanied by either a warning instruction at its introduction or in jury instructions; and c) failed to use a voice expert to scientifically prove that petitioner was not the Pancho on the November 3 wire tap intercepts speaking with Alapizco.

The report rejected petitioner's arguments. App. 42-105. The district court adopted the report with additional reasoning. The court found the record did not support petitioner's argument trial counsel was unaware of what the witnesses would testify to if called. The court found trial counsel was aware of the dangers of calling such witnesses. The court noted that a different outcome was not reasonably probable, noting the report's recitation of trial evidence against petitioner. With regard to trial counsel's failure to move to suppress the fruits of the 1993 warrant, the court found that since the search was outside the "zone of primary interest", an otherwise deficient warrant could be not be

suppressed to successfully exclude bad act or other crimes evidence.

The court agreed with petitioner that the report did not address his contention that trial counsel failed to move under California Evidence Code § 352 to exclude evidence as more prejudicial than probative. However, this contention failed since petitioner had not shown the evidence was prejudicial under *Strickland v. Washington*, 466 U.S. 668, 688 (1984). App. 5-6.

With regard to the failure of trial counsel to call a voice expert, the court rejected petitioner's argument that part of the *Strickland* prejudice analysis is that a failure to show a probability of a different result will not bar relief where the proceedings in light of the overall record are unreliable. The court found petitioner's argument would create "two tests on this leg of *Strickland* where there is in fact but one." Although trial counsel was ineffective in failing to call a voice expert, the court found when viewing the "abundant" other evidence there was no basis in undermining the confidence in and reliability of the trial to the degree that a different outcome was probable. App. 7-8.

## REASONS WHY THE WRIT SHOULD BE GRANTED

### I. PETITIONER IS ENTITLED TO A CERTIFICATE OF APPEALABILITY ON EACH CLAIM PRESENTED.

This case merits review for a number of compelling reasons. First, the Ninth Circuit's denial of a certificate of appealability ("COA") on each claim conflicts sharply with relevant decisions of this Court, particularly *Tennard v. Dretke*, 542 U.S. 902 (2004), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Slack v. McDaniel*. 529 U.S. 473 (2000) and *Barefoot v. Estelle*, 463 U.S. 880 (1983) and how the claims are considered consistent with the constitutional rules set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), *Crane v. Kentucky*, 476 U.S. 683 (1986), *Washington v. Texas*, 388 U.S. 14 (1967), and *Elkins v. United States*, 364 U.S. 206 (1960). Further, the lower court's analysis of prejudice conflicts with *Strickland v. Washington*, 466 U.S. 668 (1984) which requires a different standard and that all ineffective assistance of counsel claims be analyzed cumulatively and not separately from each other.

Second, petitioner's right not to be interrogated pursuant to *Miranda* was twice violated where officers detained him in a house being searched since he was

deprived of his freedom in a significant way and held in a room.

Third, petitioner is entitled to a COA as he has made a substantial showing of the denial of a constitutional right on each claim. 28 U.S.C. § 2253(c)(2). This threshold showing is "relatively low." *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2004). In order to obtain a COA, petitioner is not required to show he should prevail on the merits nor to prove that some justices would grant his habeas petition. A claim can be debatable even though every jurist of reason might agree, after a COA has been granted and the case has received full consideration, that petitioner will not prevail. *Miller-El, supra*, 537 U.S., at 337-38; *Barefoot, supra*, 463 U.S., at 893, n. 4. The "question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El, supra*, 537 U.S., at 342.

## II. PETITIONER MADE A FACIAL CONSTITUTIONAL SHOWING THAT STATEMENTS WERE OBTAINED FROM HIM IN VIOLATION OF *MIRANDA* WHICH DENIED HIM A FAIR TRIAL.

A. The first statement: An extensive investigation established 2641 E. Jackson and its occupants were involved in narcotics dealing. Alapizco, a major cocaine supplier, was intercepted agreeing with Pancho,

a person to whom he'd earlier delivered 300 kilos of cocaine, to a delivery of 500 kilos of cocaine. Agents followed the heavy van from McDonald's to 2641 E. Jackson where it disappeared up a driveway. It reappeared, now much lighter, and drove away. The driver was identified as Ramirez. The agents believed cocaine was delivered to the house and set up constant surveillance. No one left. Two days later on November 5 petitioner drove up and walked into the house. Twenty to thirty minutes later Ramirez drove up the driveway in a Tempo. Ramirez drove away forty minutes later and was stopped. Fifty kilos of cocaine were in the trunk. App. 14-16. Believing the rest of the cocaine might be inside the house, five to six officers went to 2641 E. Jackson and detained petitioner and Larios. Petitioner consented to a search; he and Larios were moved, without consent, to separate rooms. Although not handcuffed, petitioner was not free to go and not told he could leave. App. 113. Petitioner was under arrest. No *Miranda* warnings were given by officers keeping him in the isolated room.

Petitioner was asked if he lived there, where he was from, his legal status in the country, what he was doing at the house, could the officers search the house he said he lived at and whether he'd seen the Tempo. Petitioner denied seeing the Tempo, that he'd been there a minute before the officers had arrived, and that he no longer lived at the address he'd provided and so could not give consent to search.

The officers had probable cause to arrest petitioner since the objective facts established, as the officers believed, that the house and its occupants provided the cocaine to Ramirez and were part of a narcotics conspiracy. App. 25. The state court improperly found these objective facts amounted to a detention by police lacking probable cause, thereby not triggering *Miranda* warnings since the questioning was brief and casual. App. 115.

The state court's finding resulted in a decision that was contrary to and involved an unreasonable application of clearly established Federal law, as determined by this Court. Further, the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)&(2).

The state court determined petitioner was merely being detained although the facts established, under clearly established Supreme Court law, that he was under arrest. The state court ignored this Court's *Miranda*-triggering requirement that requires warnings when questioning by officers occurs when a person is "'otherwise deprived of his freedom of action in any significant way'." *Stansbury v. California*, 511 U.S. 318, 322 (1966); *Miranda, supra*, 384 U.S. at 444. Petitioner was deprived of his freedom of action in significant ways. He was confronted by more than six officers who began searching the residence. He was separated from Larios, a person with whom he had some

social connection before the officers arrived. He was questioned and the officer admitted he would not have been allowed to walk around the house. He clearly was not free to go as he had to remain in a sequestered room at the will of the officers.

The "'only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.'" *Stansbury, supra*, 511 U.S. at 324, citing *Berkemer v. McCarthy*, 468 U.S. 420, 442 (1984). A reasonable man who is led into a room in a house swarmed over by six or more officers, who exercise their will and police power in searching, and who is questioned in solitary would understand that his freedom of action had been deprived in a significant way. The state court decision ignored this fundamental rule which is an alternative to being placed formally under arrest.

*A Miranda* violation affords a "bright-line", legal presumption of coercion, requiring suppression of all unwarned statements. *Oregon v. Elstad*, 470 U.S. 298, 306-07, n. 1, 317 (1985). There was no evidence to show that petitioner was told he could leave or ever tried to.

The state court's approval of the initial questioning, analogizing it to a "brief and casual" traffic stop, thereby exempting it from *Miranda*, was also contrary to, or involved an unreasonable application of clearly established law as determined by this Court. App. 115. 28 U.S.C. § 2254(d)(1). What occurred to petitioner was not, as described in *Berkemer, supra*, 468

U.S., at 437-39 or *Terry v. Ohio*, 392 U.S. 1 (1968), a temporary and brief encounter done at an open roadside and exposed to public view by one officer. The questioning went beyond "what are you doing here and who are you?" to questions related to the narcotics investigation as to whether petitioner had seen the Tempo. This is improper interrogation and must be suppressed. *Pennsylvania v. Muniz*, 496 U.S. 582, 598-99 (1990).

The magistrate's report found petitioner failed to rebut the presumption of correctness of the state court's factual determinations. The report focused on whether "the restraint on petitioner's freedom of movement was of the degree associated with a formal arrest". App. 32. This was error as this Court, as noted, requires *Miranda* warnings when a person is "deprived of his freedom in any significant way." *Stansbury, supra*, 511 U.S., at 322. A formal arrest is not necessary; just any deprivation of freedom of action in any significant way.

B. The second statement. The state appellate court never ruled on petitioner's claim there was a deficient *Miranda* warning containing words in Spanish of a double negative (*"Usted tiene el derecho de no decir nada")* which translated to, "You have the right not to say nothing" or that there was no showing of a valid waiver of rights. The state court summarily denied this claim because it concluded there was no *Miranda* violation before the first statement. App. 33, 117. It did not address the misleading Spanish translation. The magistrate's report relied upon the state trial court's

decision that petitioner was advised of his rights, understood them and agreed to answer questions. App. 33-34. Although the magistrate's report found the state trial court was correct, it did not accord petitioner a hearing on the misleading Spanish *Miranda* advisal. The report found that no specific words are required to render a *Miranda* warning adequate. App. 34-35. However, petitioner's claim led to the *opposite* conclusion, that the Spanish version told petitioner he had no right not to say anything. One cannot conclude that petitioner made a knowing and intelligent waiver of a right not to speak when he is told he had no right not to speak.

The first questioning infected the second and there was no showing or court consideration to determine whether through intervening circumstances the second interrogation was insulated from the effect of all that went before it. *Clevis v. Texas*, 386 U.S. 707, 710 (1967). It is presumed a defendant does not waive his rights. The prosecution's burden to show a knowing and intelligent waiver is great. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979); *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The state failed to meet its heavy burden. *Miranda, supra*, 384 U.S., at 475.

## III. PETITIONER MADE A FACIAL CONSTITUTIONAL SHOWING THAT HIS TRIAL COUNSEL WAS INEFFECTIVE

Petitioner is entitled to a COA on his ineffective assistance of counsel claims. These errors were material to petitioner's case and explained the court of appeals question: Why was petitioner at the house?

A. Trial counsel failed to investigate and call available witnesses who would have exculpated petitioner and explained that he was not Pancho and was at the house for lawful reasons. Before petitioner's state sentencing his new attorney interviewed three former co-defendants who were now legally available since they had pleaded guilty and been sentenced. The three provided declarations that petitioner was not Pancho. Larios swore that petitioner came to 2641 E. Jackson to take his girlfriend and his baby to the hospital. All were never interviewed by petitioner's trial counsel and would have testified at petitioner's trial. Alapizco, the person to whom Pancho spoke, heard petitioner's voice exemplar and stated through a declaration of an interpreter that that voice was not Pancho's. Petitioner presented these declarations prior to sentencing. App. 47-48.

Without hearing from trial counsel or other evidence (App. 51), the motion for new trial was denied. The state court of appeal upheld the trial court's denial, finding there was no indication counsel had been unaware of the witnesses or their testimony. App. 127-

30. The magistrate found the trial court's denial was a "hearing on the merits" and the court of appeal's decision was the relevant state-court decision. App. 51. The magistrate's report concurred with the state court that trial counsel was aware of the coconspirators, what they would testify to, and made a tactical decision not to interview or call them. Therefore, it could not find that the state courts' determination that petitioner had failed to make the requisite showing of deficient performance was an unreasonable application of the *Strickland* standard. App. 53.

To support its decision, the magistrate improperly proceeded to analyze what trial counsel would have done and what the effect of the evidence would have been if it had been produced. App 53-68. The court was acting as an improper gatekeeper of the evidence petitioner was Constitutionally entitled to present to the jury for *their consideration.*

Although trial counsel during the federal hearing claimed he decided not call the co-defendants as witnesses because of evidence showing petitioner's involvement with them, the report found that evidence's benefit [testimony about trips to Las Vegas and being convicted felons] was outweighed by its potential prejudice. App. 54-55. The Las Vegas trip evidence, however, was still introduced. App. 111. That persons are convicted does not render them incompetent; it is a violation of the right to present a defense to exclude such testimony. Trial counsel's testimony was, "to some

extent, contradicted by other evidence in the record." App. 55.

The report cited the police report and the prosecutor's recollection to show other evidence to impeach the witnesses. App. 56-58. However, the magistrate's examples [petitioner denied knowing anyone next door but his brother was found there; denied knowing Ramirez but they'd gone to Las Vegas together, told the police Larios was the landlord but Larios said he was renting] would only constitute impeachment *if* petitioner's statements were introduced. However, as noted in Argument I, above, these statements must be excluded and thus would not be available to be impeached. Other examples of possible impeachment could not make the witnesses incredible as a matter of law. App. 58. In dissecting each witness' statements the report concluded there was no basis for finding that failure to interview and call petitioner's witnesses was an objectively unreasonable tactical decision. App. 61, 64, 67.

The report found that petitioner failed to establish Alapizco was available at trial and if he were, his testimony that petitioner was not Pancho would have lacked foundation. App. 67-69. However, Alapizco was familiar with Pancho's voice, having dealt with him on numerous occasions by phone. And Alapizco had the same opportunity to listen to petitioner's voice on the exemplar as did the prosecution witnesses whose testimony was admitted. Alapizco had as much

foundation to compare the known Pancho's voice with the known voice of petitioner and was as, or more, qualified as the prosecution's lay witnesses to express his opinion. Further, it would have carried more weight as he was someone who was in a position of authority and had a need to know with whom he was speaking.

The report, assuming trial counsel's failure to call these witnesses was not an objectively reasonable tactical decision, found petitioner failed to establish prejudice, or a reasonable probability the trial outcome would have been different. In arrogating itself the function of being the ultimate trier of fact, the jury, the report determined the witnesses were not "creditworthy." App. 71. To justify its conclusion, the report dissected the evidence, including petitioner's statements which must be suppressed or excluded and the devastating other crimes evidence, which petitioner urges also must be suppressed. App. 73, 79, 80. The report compared the "strength" of the prosecution evidence with petitioner's "implausible" evidence and found petitioner failed to establish prejudice. These rulings are error in that they denied petition his right to present a defense and failed to include in its cumulative analysis the report's finding that trial counsel was ineffective for failing to present a voice expert.

The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). A defendant must be allowed to present the testimony of

eye witnesses, even co-conspirators who have been convicted of the same murder and sentenced to 50 years in jail. Under the Sixth Amendment, the "right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies" is paramount. It is up to the jury determine the credit and weight of the testimony. *Washington v. Texas*, 388 U.S. 14, 16, 19, 22-23 (1967).

The report's comparing of witness' strengths and weakness was condemned in *Washington, supra*, when it ruled there cannot be a rule disqualifying defendant's witnesses who are "likely to commit perjury." *Id.* at 22. Likewise, there cannot be a rule denying a defendant his Sixth Amendment right to call witnesses because a court may believe they are likely to be impeached.

The proper standard, to comply with *Crane,* is that petitioner must be allowed to present his evidence, which "if believed" or "if credited", allows him to prove his case. *Holmes v. South Carolina*, 547 U.S. ___, 126 S.Ct. 1727, 1731-34 (2006). The lower court erred since "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Id.*

The report, in considering prejudice, also failed to consider the cumulative effect of all the errors which this Court requires. *Strickland, supra*, 466 U.S., at 694.

Petitioner objected to the court's failure to consider all the errors being considered together. App. 151.

B. Trial counsel failed to object to the introduction of prejudicial other crimes evidence the prosecution used to show petitioner was a major narcotics distributor which tied him into the conspiracy. Trial counsel was ineffective by failing to move to suppress, object, or otherwise limit the prejudicial impact of evidence seized from his residence two years earlier. To establish petitioner was not a mere visitor, the prosecution introduced "other crimes" evidence through its drug expert witness based on documents seized using a 1993 search warrant at petitioner's prior residence. Based on finding pay/owe sheets showing sales of kilo quantities of cocaine totaling over one million dollars, documents tying him to seven properties, $800,000 in wire transfers to Mexico in the previous 17 days, $100,000 in bank accounts, the expert testified petitioner was a "high level distributor of cocaine." App. 85. Trial counsel's duty as an effective attorney was to either exclude this prejudicial evidence or, at a minimum, limit its effectiveness when it was received or during instructions to the jury. Counsel failed at every stage in his duty. An attorney must object to prejudicial evidence. *Glasser v. United States*, 315 U.S. 60, 72-76 (1942).

*Failure to move to suppress*. Counsel did not move to suppress this prejudicial evidence. The report did *not* find that the warrant had sufficient probable cause; rather it found that because petitioner failed to

argue the lack of good faith under *United States v. Leon*, 468 U.S. 897 (1984) that the evidence would have been admissible. App. 86-87. However, petitioner did argue that the warrant lacked probable cause and the issue of good faith was not raised by the parties. Recognizing this, in its order denying the COA (App. 5 n. 1), the district court adopted an alternate "zone of primary interest" theory. App. 5-6.

The "zone of primary interest" as articulated in *United States v. Janis*, 428 U.S. 433 (1976) allowed evidence seized illegally by state officers during a state criminal investigation to be used in a later federal civil tax case since the civil case was likely outside the state officer's "zone of primary interest." *Id.* at 458. This is not the case here as the officers in the 1993 drug search were local criminal investigators involved in the same zone of interest in the same county in the same drug enforcement groups as prosecuted petitioner in 1995. App. 152-53. Narcotics investigations are as continuing as the persons whom are being investigated.

The "zone of primary interest" as applied here conflicts with both this Court's holdings and other circuit law. *Elkins v. United States*, 364 U.S. 206, 223 (1960); *Janis, supra*, *United States v. Hill*, 60 F.3d 672, 680 (10th Cir.), *cert. denied*, 516 U.S. 970 (1995); *United States v. Perez-Castro*, 606 F.2d 251, 253 (9th Cir. 1979); *United States v. Medina*, 181 F.3d 1078, 1083-86 (9th Cir. 1999)(Fletcher, J. dissent), *cert. denied*, 529 U.S. 1056 (2000).

The report found petitioner failed to show the introduction of this evidence was prejudicial. App. 88. Although the report failed to so find, prejudice is obvious in the way the report discussed the evidence's impact: the "search was important" although "not essential to proving any of the prosecution's main arguments." App. 88. This belies the fact the prosecution was laboring mightily to explain why petitioner was at the house. The purpose of the evidence's introduction under California Evidence Code § 1101(b) was to prove motive, intent, preparation, plan, knowledge, identity, absence of mistake or accident, all disputed issues in this lawsuit. It is prejudicial in any criminal lawsuit to have the prosecutor arguing to the jury that petitioner's pays and owes' records showed "they've done transactions clearly in the millions" and "they were doing cocaine transactions back then [1993]. *He's still doing it.*" App. 88-89.(emphasis supplied). The prosecutor's argument established prejudice.

*Failure to object based on a violation of the Confrontation Clause.* Petitioner objected that his trial counsel was ineffective in failing to raise a Confrontation Clause objection to the 1993 other crimes documents being introduced by the prosecution since there was no foundation laid to link them to him. App. 154. This was obvious error and, if the objection had been upheld at trial, the documents, the drug expert's interpretation of them, and the prosecutor's vitriolic argument about them would not have occurred. The report failed to discuss this objection. App. 82-90.

The district court admitted the report failed to discuss the contention, but, like the objection regarding seeking a limiting instruction, *infra*, although error, the court found there was no showing of prejudice under *Strickland*. App. 6. The failure to raise a Constitutional Confrontation Clause objection, an admitted ineffective assistance error which would have lead to the total exclusion of the evidence (and not how the jury should consider it as admitted evidence) cannot be considered a *de minimis* evidentiary objection.

Petitioner objected to the report's failure to address the prejudice prong since it never discussed the Confrontation Clause issue. App. 154. The district court summarily failed to discuss the issue by finding that the report's lack of analysis of prejudice to be sufficient. App. 6.

*Failure to seek exclusion by seeking a balancing analysis that the evidence's probative value was not outweighed by its undue prejudice.* Like the Confrontation Clause contention, petitioner objected that trial counsel was ineffective for failing to ask the court under California Evidence Code § 352 to exclude the evidence as its probative value was outweighed by its undue prejudice. The report failed to address this contention. App. 154. The district court agreed: "Petitioner is correct that the Magistrate Judge did not address this contention", assumed this error constituted ineffective assistance but it did not establish, *on its own*, prejudice under *Strickland*. App. 6.

*Failure to request limiting instructions*. Petitioner argued trial counsel was ineffective in failing to request a limiting instruction when the other crimes evidence

was introduced and when the jury received its instructions. App. 154. The report found no error in failing to request at least a limiting instruction to the jury at the conclusion of the trial because trial counsel had made an "informed waiver" of petitioner's right to such an instruction under any circumstances. App. 90.

Petitioner argued that trial counsel's incompetence was established by his clearly expressed thoughts while discussing the "other crimes" evidence. Counsel argued that since petitioner was not arrested, charged or convicted of any crimes, the evidence could not be admitted against him. This revealed a fundamentally flawed view of what constituted "other crimes" evidence which can be any sort of "bad acts". Even acquittals are admissible to prove bad acts. Counsel argued the evidence was "insufficient" to warrant a limiting instruction and it was scant evidence of other crimes but "I may be wrong." It cannot be said that counsel was making an informed waiver of petitioner's right not to seek a limiting instruction when he never considered the bad act evidence to rise to his definition of "other crimes" evidence. App. 155 This was clearly deficient performance. Petitioner further objected that there was no attempt made by either the report or the district court to view the errors cumulatively along with the most egregious error the court find *did constitute ineffective assistance: the failure to present a voice expert.* App. 155.

*Failure to present a voice expert.* The report and district court found trial counsel was ineffective in failing to present a voice expert, establishing the deficient performance prong of the *Strickland* standard. App. 7, 93-96. The court, however, found after a

review of the evidence, that petitioner failed to establish *Strickland* prejudice. Although petitioner criticized the report's examination of the evidence, the court found it would assess prejudice by examining the evidence to be proffered at trial. This was error and petitioner is entitled to a COA on this fundamental issue.

The prosecution needed to tie petitioner into the conspiracy and establishing that he was Pancho was a critical and necessary element. The prosecution wove throughout the trial such evidence starting with the intercepted November 3 calls with Alapizco, the discovery of the cell phone at 2641 E. Jackson (although petitioner was not seen carrying anything into the house), the prosecution's obtaining petitioner's voice exemplar and its use of three witnesses (Garcia, Chiu and the Spanish professor Pena) to compare the intercepted voice with petitioner's. App. 39, 166, 172-74.

In contrast, petitioner has been told that, despite this array of prosecution evidence, he has no right to present his defense: that he was not Pancho. Due to his counsel's ineffective representation the prosecution's case remained unrebutted and petitioner's defense was truncated. Although the Court of Appeals posited the question: "What was petitioner doing at the house?", petitioner was not allowed answer it or to present scientifically acceptable evidence. Rather, the prosecution was allowed to present witnesses who, with little or no prior contact with him, testified in their unscientific lay opinion that he was Pancho. This is unfair and a violation of due process.

Petitioner has a right to present his defense which the jury may or may not credit. *Crane, supra,* 476 U.S. at 690; *Washington, supra,* 388 U.S. at 16, 19, 22-23; *Holmes, supra.* Petitioner's evidence was more competent and reliable than the prosecution's lay witnesses. Petitioner offered a distinguished linguist Professor, Dr. Peter Ladefoged. App. 121.

The lower court's analysis is more strict than the *Strickland* prejudice test and is thus erroneous. That court disagreed with petitioner's argument that a failure to show such a probability of a different result will not bar relief where the proceedings are unreliable. The court found this argument to "put a gloss on the test that is not there" and to accept his argument would "create two tests on this leg of *Strickland.*" App. 7. However, petitioner's argument is directly derived from *Strickland's* reasoning: "The result of a proceeding can be considered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland, supra,* 466 U.S. at 694.

This Court in considering such habeas claims, "should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id., supra,* at 696. "[F]undamental fairness is the central concern of the writ of habeas corpus." *Id.* at 697. It is not fundamentally fair to refuse to allow a defendant the opportunity to present his evidence to the jury after the court has acknowledged that his counsel was ineffective for failing in that regard.

The lower court noted, per *Strickland*, that prejudice would be here defined as "a reasonable probability that a different result *might* have obtained if an expert had made the appropriate comparisons and been called at trial". App. 7.(emphasis supplied). The court was correct in using "might" but then adopted a much stricter standard to negate that word's effect.

Petitioner further argued that this Court requires the habeas reviewing court to view the alleged errors cumulatively since *Strickland* speaks of the "errors of counsel." *Id.* at 694. App. 157. The lower court never considered the admitted unprofessional errors together. Although the lower court found trial counsel erred in producing a voice expert, it failed to consider this error when determining whether or not prejudice occurred by the failure to interview and further call the co-defendants. The lower court failed to consider this error when considering whether there was prejudice when he failed to move to suppress, failed to object based on the Confrontation Clause, failed to seek a balancing analysis, and failed to seek a limiting instruction.

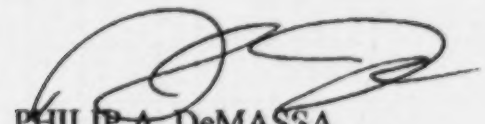
In viewing these errors cumulatively, even by less than a preponderance of evidence standard as *Strickland* allows, the proceeding was unreliable and unfair.

## CONCLUSION

A writ of certiorari should issue to review the important issues raised herein and that a certificate of appealability be granted on all claims.

Dated: October 23, 2006

Respectfully submitted,



PHILIP A. DeMASSA
*Counsel of Record*
PHILIP A. DeMASSA APC
2356 Moore Street
Suite 201
San Diego, CA 92110
Attorney for Petitioner
pad_jefe@msn.com

No._____

*IN THE*
*SUPREME COURT OF THE UNITED STATES*

**FRANCISCO CHAVEZ AYON,**

**Petitioner,**

**v.**

**DEPARTMENT OF CORRECTIONS,**

**Respondent.**

***On Petition For Writ of Certiorari***
***To the United States Court Of Appeals***
***For The Ninth Circuit***

# APPENDIX

**PHILIP A. DeMASSA**
***Counsel of Record***
**PHILIP A. DeMASSA, APC**
**2356 Moore Street, Suite 201**
**San Diego, CA 92110**
**(619) 294-2777 Telephone**
**(619) 294-2120 Facsmile**
***Attorney for Petitioner***

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

FILED
JUL 25, 2006
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

| | |
|---|---|
| FRANCISCO CHAVEZ AYON, | ) No. 05-56732<br>) D.C. CV 02-5564-JVS<br>) Central California |
| Petitioner-Appellant, | ) (Los Angeles) |
| v. | ) ORDER |
| DEPARTMENT OF CORRECTIONS, et. al., | ) |
| Respondent. | ) |

Before: HAWKINS and THOMAS, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). All pending motions are denied.

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| FRANCISCO CHAVEZ AYON, | ) Case No. ) CV 02-5564-NS (RNB ) ORDER DENYING |
| Petitioner, | ) MOTION FOR ) CERTIFICATE OF |
| vs. | ) APPEALABILITY |
| DEPARTMENT OF CORRECTIONS, | ) |
| Respondent. | ) |

On September 20, 2005, petitioner filed a timely Notice of Appeal from the Judgment entered herein on August 25, 2005. Petitioner had previously filed a Motion for Certificate of Appealability on September 12, 2005. Pursuant to the order of the assigned Magistrate Judge, respondent filed opposition to petitioner's Motion on October 18, 2005, and petitioner filed a reply thereto on October 27, 2005.

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that, to obtain a Certificate of Appealability under § 2253(c), a habeas

prisoner must show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 429 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)(internal quotation marks omitted); see also Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 1039, 154 L. Ed. 2d 931 (2003).

Here, after review and consideration of petitioner's contentions in his Motion for Certificate of Appealability, respondent's opposition to the Motion, and petitioner's reply to respondent's opposition, the Court finds and concludes that petitioner has not made the requisite showing with respect to any of the claims for which a Certificate of Appealability is sought.

Accordingly, petitioner's Motion for Certificate of Appealability is DENIED.

Dated: November 10, 2005

/S/ JAMES V. SELNA
JAMES V. SELNA
UNITED STATES
DISTRICT JUDGE

Presented by:
/S/ ROBERT N. BLOCK
Robert N. Block
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

| | |
|---|---|
| FRANCISCO CHAVEZ AYON, | ) Case No.: ) CV 02-5564-NS (RNB) ) |
| Petitioner, | ) ORDER ADOPTING ) FINDINGS, |
| vs. | ) CONCLUSIONS AND ) RECOMMENDATIONS |
| DEPARTMENT OF CORRECTIONS, et al., | ) OF UNITED STATES ) MAGISTRATE JUDGE ) |
| Respondents. | ) ) |

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition and all the records and files herein, including the Report and Recommendation of United States Magistrate Judge and Petitioner's Objections To Magistrate Judge's Report and Recommendation. Having made a de novo determination of those portions of the Report and Recommendation to which objections have been made, the Court concurs with and adopts the findings, conclusions and recommendations of the Magistrate Judge.

In adopting the Report and Recommendation, the Court finds that Magistrate Judge's exhaustive analysis of

Petitioner's claims correctly leads to the conclusion that those claims are without merit. Nevertheless, the Court addresses several issues raised in Petitioner's Objections.

With regard to the claim that the failure of Petitioner's trial counsel to interview his co-conspirators supports the grant of the writ, Petitioner assumes that Petitioner's counsel was unaware of what these witnesses might say on the stand. Even if one indulges this assumption, which the Court does not believe is supported by the record, Petitioner's counsel certainly knew the dangers of calling any of these witnesses. More significantly, however, and not addressed in Petitioner's Objections, is the fact that even with the testimony of the co-conspirators a different outcome was not reasonably probable. The Magistrate Judge has noted in detail the hard, interlocking evidence which ties the Petitioner to the conspiracy. (Report, pp. 42-49.)

With regard to the claim that Petitioner's trial counsel failed to move to suppress the fruits of the 1993 warrant, the Court finds that the 1993 search was outside the "zone of primary interest," and thus the claim fails even if the warrant were deficient.[1] While Petitioner wishes that Judge Fletcher's dissent in United States v. Medina, 181 F.3d 1078, 1083 (9th Cir. 1999), cert.

[1]Petitioner minces words when he attacks the Magistrate Judge's assertion that Petitioner never asserted that the warrant was facially deficient. (Petitioner's Objections, pp. 13-14.) A claim that there was an absence of probable cause- a claim which Petitioner did make (Petition, ¶ 10 (b))- is not the same as facial deficiency.

denied, 529 U.S. 1056 (2000), were the holding,[2] that is not the case. Moreover, Petitioner's observation that drug investigations may extend over a considerable period does not bring this case within the 1993 search's "zone of primary interest." (Petitioners' Objections, p. 23.)

With regard to the claim that Petitioner's trial counsel failed to move under California Evidence Code § 352 to exclude evidence from the 1993 search as more prejudicial than probative, Petitioner is correct that the Magistrate Judge did not address this contention. (Id.; pp. 27-28.) Assuming that the failure constituted an error under the first leg of Strickland, Petitioner was still required to show that the evidence was prejudicial under Strickland. Strickland v. Washington, 466 U.S. 668, 688 (1984). The Magistrate Judge found that it was not, and the Court concurs. (Report, pp. 53-54.) For like reason, Petitioner's claim that his trial counsel failed to object to the introduction of the evidence on the ground that it violated his rights under the Confrontation Clause fails.[3]

With regard to the claim that Petitioner's trial

---

[2] See Petitioner's Objections, pp. 22-23.

[3] As the Magistrate Judge points out. this evidence did not go unchallenged. (Report, p. 49.) In fact, Petitioner's trial counsel opposed the introduction of such "other bad acts" evidence under Section 1101(b) of the California Evidence Code prior to trial while the trial court would have been called upon to apply different tests had a challenge been made under Section 352 of the California Evidence Code or the Confrontation Clause, the fact that an attack on the evidence was made renders it doubtful that it was a failure under the Strickland standard to make every possible attack.

counsel failed to call a voice expert, the Magistrate Judge found that Petitioner established the first leg of the Strickland test; namely, the objective unreasonableness of trial counsel's failure to have an expert compare the voice exemplar with the intercepted tapes. (Report, p. 59.) While Petitioner criticizes the Magistrate Judge for his detailed consideration of the expert voice testimony developed at the trial and at the evidentiary hearing (e.g., Petitioner's Objections, p. 36), the Court knows of no other way to assess prejudice, the second leg of the Strickland test, than to examine the evidence which Petitioner might have proffered at trial. Even in his criticisms, however, Petitioner acknowledges that the Magistrate Judge correctly defined that test as a reasonable probability that a different result might have obtained if an expert had made the appropriate comparisons and been called at trial. (Id. pp. 45-46.) But Petitioner puts a gloss on the test that is not there.[4] Petitioner argues that a failure to show such a probability will not bar relief where the proceedings in light of the overall record are unreliable. (Id. pp. 37, 45, *citing* Strickland, 460 U.S. at 694.) Petitioner would create two tests on this leg of Strickland where there is in fact but one. As the Supreme Court noted recently in Holland v. Jackson, 542 U.S. 649, 688 (2004), it is the reasonable probability of a different result which undermines confidence in the outcome in the trial court. While the Strickland test can be met by a showing which is less than a preponderance of the evidence, neither Strickland

---

[4] Petition argues for this false dichotomy in support of several other claims. (E.g.,Petitioner's Objections. pp. 10-11,37.)

nor its progeny dispense with the reasonable probability of a different outcome. (Id.; Strickland, 460 U.S. at 694.) Given the abundance of evidence other than the prosecution's expert voice testimony, there in no basis for undermining the confidence in and the reliability of the proceedings in the trial court to the degree that a different outcome was probable.

IT THEREFORE IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order and the Judgment herein by United States mail on counsel for the parties of record.

DATED: August 22, 2005

Signature of James V. Selna
JAMES V. SELNA
UNITED STATES
DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

| | |
|---|---|
| **FRANCISCO CHAVEZ AYON,** | **Case No. CV 02-5564-NS (RNB)** |
| **Petitioner,** | **REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE** |
| **DEPARTMENT OF CORRECTIONS, et al,** | |
| **Respondents.** | |

This Report and Recommendation is submitted to the Honorable James V. Selna, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

**PROCEEDINGS**

On July 15, 2002, petitioner (through counsel) filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Pet.") herein. Respondent filed an Answer to Petition for Writ of Habeas Corpus ("Ans.") on November 4, 2002, to which petitioner filed a Traverse ("Trav.") on December 30, 2002. In an Minute Order issued January 6, 2003, the Court advised the parties of

its conclusion that respondent had done an inadequate job addressing the merits of two of petitioner's claims and ordered respondent to file a Supplemental Answer rebriefing those claims. The Court also advised the parties of its conclusion that further development of the record was warranted with respect to two of petitioner's ineffective assistance of trial counsel claims.

On February 26, 2003, respondent filed a Supplemental Answer ("Supp. Ans."), and petitioner filed a Supplemental Traverse ("Supp. Trav.") thereto on March 18, 2003. On May 12, 2004, petitioner additionally filed a "Brief Regarding the 'Alibi' Issue," to which respondent filed a response on May 18, 2004.

The parties conducted a video-taped deposition of petitioner's trial counsel, Steven Romero ("Romero"), on May 22, 2003, and a transcript of the deposition, along with a copy of the video-tape, thereafter was lodged with the Court ("Romero Depo."). Thereafter, the Court ordered an evidentiary hearing,[5] which ultimately was

---

[5]On July 17, 2003, respondent filed an "Objection to Evidentiary Hearing" ("Objection"), wherein respondent contended that, under AEDPA, there are "stringent limits on evidentiary hearings" that dictate that "it will almost never- if ever-be permissible for a federal habeas court to hold an evidentiary hearing on claims denied on the merits in state court"; and that "permitting a petitioner" to "further develop his claims in federal court would be inconsistent with § 2254( d)." (Objection at 1,4). At a status conference subsequently held on July 23, 2003, respondent's counsel clarified that the Objection was intended merely as

(continued...)

held May 25 to 27, 2004, and concluded on June 8 to 9, 2004. Petitioner filed a Post Hearing Brief ("Petitioner's Brief") on October 25, 2004, and a "Post-Hearing Brief-Supplemental Citations" on October 28, 2004. On January 24, 2005, respondent filed a Post-Evidentiary Hearing Brief ("Respondent's Brief").

Thus, this matter finally is ready for decision.

## BACKGROUND

On December 1, 1997, a Los Angeles County Superior Court jury found petitioner guilty on four counts: (I) conspiracy to commit the crimes of possession for sale of cocaine, the sale and transportation of

---

(...continued)
an "objection for the record," and not as an application for District Judge review of a Magistrate Judge order. The Court's view remains as stated at the time--i.e., that AEDPA does not impose an impediment to a federal district court holding an evidentiary hearing where, as here, petitioner sought an evidentiary hearing in state court and the hearing was not granted. Respondent's interpretation of § 2254(d) would render § 2254(e) superfluous, and cannot be reconciled with the Ninth Circuit's recent reiteration of the AEDPA standard for an evidentiary hearing in Oloth Insyxiengmay v. Morgan, 2005 WL 712483, *10-*11 (9th Cir.), or the Ninth Circuit cases upholding the authority of the district court to conduct evidentiary hearings in cases governed by the AEDPA and/or remanding to the district court for further development of the record. See, e.g., Ortiz-Sandoval v. Clarke, 323 F.3d 1165, 1171 n.4 (9th Cir. 2003) (stating that 28 U.S.C. § 2254(e)(2) governs whether a district court may hold an evidentiary hearing); Parrish v. Small, 315 F.3d 1131, 1135 (9th Cir. 2003) (remanding for evidentiary hearing to develop the record on the issue of prejudice).

cocaine, and possession of narcotic proceeds; (2) possession for sale of cocaine; (3) offering to sell and transport cocaine; and (4) possession of more than $100,000 obtained from the sale of cocaine. (See 2 Clerk's Transcript ["CT"] 421-30,433-34; 10 Reporter's Transcript ["R.T"] 2258-69).[6] Further, the jury found that 18 of 19 alleged overt acts had been committed by petitioner and the other co-conspirators in furtherance of the conspiracy. (See 2 CT 422-25; 10 RT 2259-63). Finally, the jury found to be true the allegations that the cocaine exceeded 80 kilograms by weight; that a principal was armed with a firearm, to wit, a 356 Magnum revolver and a 12 gauge shotgun; and that petitioner knew that a principal was armed. (See 2 CT 421, 429; 10 RT 2258, 2263-67).

After new counsel appeared on behalf of petitioner on December 11, 1997, petitioner filed a motion for a new trial based on trial counsel's failure to interview and to call as witnesses petitioner's co-conspirators. (See 2 CT 435,440-41; Supp. CT of 12/14/98 at 18-42; 10 RT 2273-77, 2308-355). On March 9, 1998, the motion was denied and petitioner was sentenced to state prison for a total term of 32 years to life. (See 2 CT 440-43; 10 RT 2355-71). On April 3, 1998, the trial court denied petitioner's motion to

---

[6] Petitioner was acquitted of a fifth count of violation of California Health and Safety Code § 11366.8(a) (use of a false compartment with intent to conceal a controlled substance). (See 2 CT 430, 433; 10 RT 2267).

reconsider his motion for a new trial. (See Supp. CT of 2/18/99 at 110-17; 10 RT 2378-79).

Petitioner appealed his conviction to the California Court of Appeal, raising inter alia claims corresponding to his First, Fourth, and Fifth claims herein. In an unpublished decision issued on December 19, 2000, the California Court of Appeal re-instated the trial court's original sentence, but otherwise rejected petitioner's claims in all respects and affirmed the judgment.[7] (See Ans. Exh. B). Petitioner's ensuing Petition for Review to the California Supreme Court was summarily denied on March 28, 2001. (See Ans. Exhs. C, D).

On March 20, 2002, petitioner's filed a habeas petition in the Los Angeles Superior Court, in which he raised claims corresponding to his First, Second, Third, and Fourth claims herein: (See Ans. Exh. E). That petition was denied on March 26, 2002, on the basis that petitioner had raised the same claims in his direct appeal.[8] (See Ans. Exh. F). Petitioner next filed a habeas

---

[7] On March 13, 1998, the trial court had recomputed the sentence and re-sentenced petitioner to a term of 35 years to life. (10 RT 2380-86). On appeal, the Court of Appeal overturned the second sentence based on its finding that the re-sentencing was beyond the trial court's jurisdiction. (Ans. Exh. B at 48-49).

[8] Technically, the Superior Court was incorrect with respect to one of (continued...)

petition raising the same claims in the California Court of Appeal, which was summarily denied without citation of authority on April 9, 2002. (See Ans. Exhs. G, H). Petitioner then petitioned the California Supreme Court for review of the Court of Appeal's denial of his habeas petition. (See Ans. Exh. I). That Petition for Review was summarily denied without citation of authority on July 10, 2002. (See Ans. Exh. J).

The filing of the instant Petition followed.

## SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL[9]

Since petitioner is not contesting the sufficiency of the evidence to support his convictions, the following summary is taken from the "Background" section of the California Court of Appeal opinion. (See Ans. Exh. B at B-29 to B-32).

*1. Prosecution evidence*

*In the fall of 1995, DEA Special Agent Dave Marzullo, a member of a multi-agency task force investigating narcotics trafficking, was conducting a federal wire tap on Rafael Alapizco, a major cocaine*

(...continued)
petitioner's claims.

[9] A summary of the evidence presented at the Evidentiary Hearing conducted herein is contained in Appendix A hereto.

*supplier. Alapizco used two houses in Bellflower to store cocaine. The police had installed video cameras in these houses.*

*On November 3, 1995, the wire tap recorded a series of phone calls. First, a man called from Mexico and told Alapizco to get 300 kilograms of cocaine ready for Pancho, the person to whom Alapizco had given 500 kilograms of cocaine two weeks earlier. Alapizco said he had Pancho's telephone number. (When Alapizco was subsequently arrested, he had a piece of paper on which was written: "Pancho," the telephone number "[(213)] 999-2958." and the number "500.") The caller told Alapizco not to contact Pancho until everything was set. When the man called back, Alapizco confirmed that Pancho "wanted the three." Alapizco then called (213) 999-2958. The man who answered identified himself as Pancho. Alapizco said he was the person from the other day who had the maroon van. When Pancho indicated he was waiting for a call from Mexico, Alapizco said that he was calling on his behalf. A meeting was arranged. About 3:30 p.m, Alapizco called Pancho again and asked how long it would take for his people to arrive. Alapizco agreed to meet at 5:00 p.m. at a hamburger stand and said he would leave the keys in the ashtray. Based on prior information, surveillance was set up at a McDonald's restaurant in Lakewood. Alapizco called Pancho back to say the meeting would be at 4:00 p.m.*

*At 4:00 p.m., a maroon van left one of Alapizco's Bellflower houses and drove to the McDonald's. Roberto Ramirez got into the van and drove away. He was*

*followed to a house at 2641 E. Jackson, where the van disappeared up the driveway. Forty minutes later, Ramirez again drove off in the van. Surveillance was set up on the 2641 E. Jackson house.*

*Between 10:20 and 10:30 a.m. on November 5, 1995, defendant Ayon drove up to 2641 E. Jackson and went into the house. Between 10:40 and 10:50 a.m., Ramirez arrived in a gray Ford Tempo and disappeared up the driveway. Ramirez drove away from the house about 11: 30 a.m. and was stopped by the police. He had 50 kilograms of cocaine in the trunk. At 11:45 a.m., Orange County Deputy Sheriffs John Ortega and Rodolfo Garcia approached the front door of 2641 E. Jackson, where they encountered Ayon, who let the officers enter and search the house. There was a cell phone on a couch; the number of the phone was (213) 999-2958 - the same number Alapizco had been calling. Officer Scott McKnight walked up the driveway of 2641 E. Jackson. He saw two cars parked in the backyard. Behind some trees and bushes, there was a break in the wooden fence separating 2641 E. Jackson from the house next door, 2639 E. Jackson. There was a makeshift gate across the break in the fence, and a pathway connecting the two properties. Juan Chavez Ayon let McKnight and another officer into the house at 2639 E. Jackson. McKnight noted a chemical odor related to narcotics. Jesus Lara and Jose Ontiveros were in the living room. A loaded handgun was protruding from a sofa. Subsequently, a shogun, a money counting machine, piles of currency and 450 kilograms of cocaine were*

*found in the house.*

*Alerted to this discovery, Officer Garcia visited 2639 E. Jackson, where he saw the cocaine, guns, and money. He talked to the three suspects and determined the cocaine had been brought to the house from the direction of the pathway joining the two properties. One of the suspects, Juan Chavez Ayon, denied being related to defendant Ayon. Garcia returned to 2641 E. Jackson, where he arrested Ayon, gave him a Miranda warning, and questioned him. Ayon denied knowing either Ramirez or Juan Chavez Ayon.*

*Ayon's car was registered at an address on Domart St., and a search of that location turned up a traffic citation issued to Roberto Ramirez, and airline tickets in the names of Ayon, Ramirez, and Juan Chavez Ayon for a trip to Las Vegas on September 29, 1995; other records showed they had flown back to Los Angeles the following day. Ayon had made 22 trips to Las Vegas in 1994 and 1995, and he had gambled more than $800,000.*

*Ervie Pena, a professor of Spanish, listened to tapes of the November 3,1995, phone calls, as well as to an exemplar of Ayon's voice. Pena testified the voices were the same. James Chiu, a wire tap monitor, had been present when Ayon provided the voice exemplar. Chiu testified Ayon's voice was the same as Pancho's voice in the November 3, 1995, tapes.*

*2. <u>Defense Evidence</u>*

*Irlanda Soto, the mother of Ayon 's baby, testified*

*she went to 2641 E. Jackson on Friday afternoon, November 3, 1995, to meet with Ayon. She left about 9:30 a.m. on Sunday, November 5, 1995, without having seen him.*

*Rosario Hernandez Lopez had known Ayon for 19 years. Ayon had lived in Hernandez 's rental property at 1217 Mulberry St. in Compton from 1981 to 1991, and Ayon' half brother Nicolas had lived there from 1991 through November 1995.*

*Jose Garcia and Ayon operated a sand transporting business in Compton. Garcia never saw Ayon in possession of a cell phone.*

**PETITIONER'S CLAIMS**

1. Petitioner received ineffective assistance of counsel when his trial counsel failed to interview and call as witnesses petitioner's co-conspirators who were willing to provide exculpatory testimony. (See Pet. ¶ 10(a), Add. ¶ 10(a); Trav. at 4-17).

2. Petitioner received ineffective assistance of counsel when his trial counsel failed to object to the admission of evidence of other crimes, failed to move to suppress the earlier-obtained evidence based on the lack of probable cause for the search warrant, and failed to request a jury instruction limiting consideration of such evidence once it had been introduced. (See Pet. ¶ 10(b), Add. ¶ 10(b); Trav. at 17-28; Supp. Trav. at 2-8).

3. Petitioner received ineffective assistance of counsel when his trial counsel failed to present a defense expert in voice comparisons. (See Pet. ¶ 10(c), Add. ¶ 10(c); Trav. at 28-32).

4. Petitioner's right to a fair trial was violated by the introduction of his statements to the police. (See Pet. ¶ 10(d); Trav. at 32-40; Supp. Trav. at 8-14).

5. The trial court's instruction to the jury on "consciousness of guilt" violated petitioner's Fourteenth Amendment right to due process. (See Pet. ¶ 10(e), Add. ¶ 10(e); Trav. at 41-43).

**STANDARD OF REVIEW**

The standard of review applicable to petitioner's claims herein is set forth in 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--( 1 ) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of

> the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceedings."

Further, a state court factual determination must be presumed correct unless rebutted by clear and convincing evidence. See 28 U.S.C. § 2254(e)(I)(as amended).

Under the AEDPA, the "clearly established Federal law" that controls federal habeas review of state court decisions consists of holdings (as opposed to dicta) of Supreme Court decisions "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

Although a particular state court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. See Williams, 529 U.S. at 391, 413. A state court decision is "contrary to" clearly established federal law if the decision either applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. See Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed 2d 263 (2002) (per curiam); Williams, 529 U.S. at 405-06. When a state court decision adjudicating a claim is

contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." Williams, 529 U.S. at 406. However, the state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early, 537 U.S. at 8.

State court decisions which are not "contrary to" Supreme Court law may only be set aside on federal habeas review "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or are based on 'an unreasonable determination of the facts.'" Early, 537 U.S. at 11 (citing 28 U.S.C. § 2254(d) and adding emphasis). A state court decision that correctly identified the governing legal rule may be rejected if it unreasonably applied the rule to the facts of a particular case. See Williams, 529 U. S. at 406-10, 413 (e.g., the rejected decision may state the Strickland rule correctly but apply it unreasonably); Woodford v. Visciotti, 537 U.S. 19, 24-27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002)(per curiam). However, to obtain federal habeas relief for such an "unreasonable application," a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Woodford, supra; Williams, 529 U.S. at 413. An "unreasonable application" is different from an erroneous or incorrect one. See Williams, 529 U.S. at 409-10; see also Woodford, 537 U.S. at 25; Bell v. Cone, 535 U.S.

685, 699, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). Where the state courts supply no reasoned decision, the court must perfom an "independent review of the record to ascertain whether the state court decision was objectively unreasonable." Himes v. Thompson, 336 F .3d 848, 853 (9th Cir. 2003) (internal quotation marks omitted).

The Ninth Circuit has held that the same standard of objective unreasonableness applies where the petitioner is challenging the state court's factual findings under 28 U.S.C. § 2254(d)(2). See Bruce v. Terhune, 376 F.3d 950, 954 (9th Cir. 2004); Taylor v. Maddox, 366 F.3d 992, 999 (9th Cir.), cert. denied, 125 S. Ct. 809 (2004). In Taylor, the Ninth Circuit observed that "[s]uch a challenge may be based on the claim that the finding is unsupported by sufficient evidence, that the process employed by the state court is defective, or that no finding was made by the state court at all." 366 F.3d at 999 (internal citations omitted). In order to conclude that a state court finding was unsupported by substantial evidence in the state court record, the reviewing federal habeas court "must be convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." 366 F.3d at 1000. In order to conclude that the state court fact-finding process was defective in some material way, the reviewing federal habeas court "must be satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the

state court's fact-finding process was adequate." Id. Examples in this latter category are where the state court "makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence", where the state courts "plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim," and where the state court "has before it, yet apparently ignores, evidence that supports petitioner's claim." 366 F.3d at 1001. As the Ninth Circuit explained, "Once the state court's fact-finding process survives this intrinsic review...the state court's findings are dressed in a presumption of correctness ...." 366 F.3d at 1000.

**DISCUSSION**

A. **Habeas relief is not warranted with respect to petitioner's claim that his right to a fair trial was violated by the introduction of evidence of his statements to the police.**

Petitioner claims that his right to a fair trial was violated by the introduction of the two statements he made to the police. Petitioner argues the statements obtained during the first interview were obtained in violation of Miranda v. Arizona, 384 U.S.436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In addition, petitioner asserts that the Spanish-language Miranda notice given before his second interview was defective and petitioner

did not give a valid waiver. Thus, petitioner maintains, the statements obtained during the second interview were also obtained in violation of Miranda. (See Pet.¶ 10(d); Trav. at 32-40; Supp. Trav. at 8-14).

1. The record below

The record reflects that, prior to trial, defense counsel moved to exclude evidence of petitioner's two statements to Officer Garcia. Defense counsel argued that the first statement was obtained in violation of Miranda because petitioner was in custody and the questions were designed to elicit incriminating information. In addition, defense counsel argued that the second interview should be excluded because it was tainted by the first interview. Further, apart from the initial violation of Miranda, defense counsel also argued that the Spanish-language warning that petitioner was given was defective and, consequently, petitioner did not waive his rights prior to giving the second statement. (See 1 CT 6-20). Following extensive arguments during a hearing that began on June 20, 1996, and was continued until July 11, 1996, the trial court denied the motion in its entirety. (See RT of June 20, 27, July 11, 1996, at 92-158). The trial court found that no Miranda warning was required prior to the first statement because petitioner was not in custody but, rather, was in temporary detention during a search. (Id. at 108-09). The trial court found that the second statement did not violate Miranda because no specific words were required to satisfy the Constitution and the totality of the

circumstances indicated that petitioner had been advised of his rights, had stated that he understood his rights, and had agreed to talk. (Id. at 148-49, 157).

In rejecting this claim when petitioner raised it on direct appeal, the California Court of Appeal reasoned as follows[10]:

> "Officer Garcia testified at the preliminary hearing that he and Officer Ortega went to the spot where Ramirez had been stopped, and saw the cocaine in the trunk of Ramirez's car. Garcia and Ortega then returned to 2641 E. Jackson at 11:47 a.m., thinking that the rest of the cocaine might be inside the house. They went to the front door and saw Ayon standing in the doorway. Ortega told Ayon they were doing a drug investigation and asked for permission to enter the house. Ayon gave his consent. There was another man inside, Efrain Larios-Mendoza. Both Ayon and Larios-Mendoza gave consent for the officers to search the house. At that point, five or six other officers entered and began searching. Ayon and Larios-Mendoza were

---

10

Under Ylst v. Nunnemakel, 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991), it may be presumed that the California Supreme Court, by its silent denial of petitioner's Petition for Review raising the same claim, did not intend to change the California Court of Appeal's reasoned decision rejecting it. See Ylst, 501 U.S. at 803-04.

taken into separate rooms. Ayon was not handcuffed and, although Garcia did not say he couldn't leave, Garcia testified he would not have allowed Ayon to wander around the house unaccompanied while the search was going on. He asked Ayon who lived at the house, if he lived there, where he was from, how long he had been in the U.S., and what he was doing at the house. Ayon said he didn't live there and that he had arrived about one minute before the officers. He had come to visit Larios-Mendoza and take him out to lunch. He told Garcia he lived at 124 North Pearl in Compton, but when Garcia asked him for consent to search that house, Ayon said he used to live on North Pearl, but that he now lived in Tijuana. When Garcia asked if he had seen the gray Ford Tempo, Ayon said he hadn't seen any vehicle arrive or leave in the time he'd been there. Garcia's conversation with Ayon lasted 10 or 15 minutes.

"While Garcia was talking to Ayon, other officers searched 2639 E. Jackson and discovered drugs, guns, and money. After Garcia learned of these findings and made a visit to the house next door, he put Ayon under arrest. Garcia then Mirandized Ayon and asked him exactly the same questions he had asked before. Ayon gave basically the

same answers. Garcia's second conversation with Ayon took place about an hour after the first conversation.

"Based on the preliminary hearing testimony, the trial court held Garcia's first conversation with Ayon did not violate Miranda because there was no suggestion of any coercion or threats and, although Ayon was not free to leave, he had been legitimately detained during a search for drugs and weapons in order to insure officer safety; therefore, Ayon was not in custody until the arrest. We agree with the trial court that, in these circumstances, no Miranda warning was required.

"It is well-established that a suspect, temporarily detained by police lacking probable cause to make an arrest, need not be given Miranda warnings as long as the questioning is brief and casual. The model for this situation is "the usual traffic stop [which] is more analogous to a so-called 'Terry stop,' ...than to a formal arrest." (Berkemer v. McCarty (1984) 468 U.S. 420, 439, fn. omitted). "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the

officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of Miranda." (Id. at pp. 439-440, fns. omitted).

"In People v. Clair (1992) 2 Cal. 4th 629, police officers investigating a burglary report found the defendant hiding in a bed. The officers confronted him with drawn guns, ordered him not to move, and asked him a series of questions (who he was, if he had identification or lived in the apartment, what he was doing there, whether he knew the occupants). Clair held that in these circumstances the defendant had not been in custody or interrogated; he had merely been subjected to legitimate questioning during a temporary detention and, therefore, no Miranda warning was required. (Id. at pp. 679-680). Ayon tries to distinguish Clair by arguing that Garcia and Ortega "already knew suspicion was focused directly on appellant and his present criminal involvement in the house from which the cocaine ... had just left." Not necessarily; after all, this was Ayon's first known appearance in the investigation. In any event, "any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions

remain undisclosed) is not relevant for purposes of Miranda." (Stansbury v. California (1994) 511 U.S. 318, 326).

"We conclude, therefore, that there was no Miranda violation preventing admission of Ayon's answers to Garcia's initial questions. Given this result, there is no need to address Ayon's claim that his same answers-given during his second conversation with Garcia-were inadmissible because the Spanish-version of the Miranda warnings was defective." (Ans. Ex. B at B-33 to B-37 (some internal citations omitted)).

2. Petitioner's first statement

A suspect who is subject to custodial interrogation has the right to remain silent. See Miranda, 384 U.S. at 444, 479; see also Dickerson v. United States, 530 U.S. 428, 442, 120 S.Ct. 2326, 147 L. Ed. 2d 405 (2000); United States v. Ross, 123 F.3d 1181, 1187 (9th Cir. 1997), cert. denied, 522 U.S. 1066 (1998). "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." See Miranda, 384 U.S. at 473-74; United State v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988). However, an officer's obligation to give a suspect Miranda warnings before interrogation arises only when the individual is "in custody." Oregon v. Mathiason, 429. U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed.

2d 714 (1977) (per curiam). To determine whether an individual was in custody, a court must, after examining all of the circumstances surrounding the interrogation, decide "whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994) (internal quotation marks omitted); see also Florida v. Bostick, 501 U.S. 429, 437, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) (explaining that an individual is not seized when officers merely question him or ask for identification, so long as officers do not convey the message that compliance is required). This determination "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Id. at 323.

Petitioner argues that a Miranda warning was required because it was clear that the police officers "had probable cause to arrest petitioner before they interrogated him," he was not free to leave during the search of the residence, and the questioning was "designed to elicit incriminatory admissions in an ongoing narcotics investigation." (Trav. at 34-38).

The determination of whether an individual is "in custody" for purposes of Miranda is a mixed question of law and fact; but, "the state trial court's answers to the

'scene - and action-setting questions' (i.e., the underlying factual questions) still are entitled to a presumption of correctness." Bains v. Cambra, 204 F.3d 964, 972 (9th Cir.)(quoting Thompson v. Keohane, 516 U.S. 99, 111-12, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995)), cert. denied, 531 U.S. 1037 (2000). Here, the trial court found that: (a) petitioner met the officers outside the front door of the residence; (b) petitioner gave permission to the officers to enter and search the residence at 2641 E. Jackson; (c) petitioner was not formally arrested until nearly an hour later, after evidence of cocaine, currency and weapons had been found at 2639 E. Jackson; (d) the first interview lasted only 10 to 15 minutes; (e) no weapon was ever pointed at petitioner, nor was he coerced, threatened, shackled, or otherwise placed in any physical restraint; and (f) the questioning was narrative and focused only on identification matters such as where petitioner lived. (RT of June 20, 1996, at 95-101, 104-07). Pursuant to 28 U.S.C. § 2254(e)(1), such factual determinations by a state court are presumed to be correct unless the petitioner rebuts the presumption "by clear and convincing evidence."

Here, petitioner has adduced no evidence to rebut the foregoing factual determinations by the trial court. Although petitioner argues correctly that he was not free to leave during the initial search of the residence (see 1 CT 40-41), the relevant question is whether the restraint

on petitioner's freedom of movement was of the degree associated with a formal arrest. See Stansbury, 511 U.S. at 322. Contrary to petitioner's contention, the subjective knowledge and intent of the police officers conducting the initial interview are irrelevant if such was not communicated to petitioner. See id at 324 ("It is well settled, then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purpose of Miranda.") Here, petitioner freely consented to the search of the residence; there was no evidence of any coercion or intimidation. (See 6 RT 1405-12). The questioning during the first interview was brief and focused only on petitioner's identity and the reason for his presence at the residence being searched. (See 6 RT 1412-19). Under these circumstances, the Court is unable to find or conclude that the state court's finding that petitioner was not in custody at the time of his first interview was contrary to or involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts. See, e.g., United States v. Gregory, 891 F.2d 732, 735 (9th Cir. 1989) (concluding that defendant was not in custody because he consented to being questioned in his home, no coercion or force was used although the police initially drew their guns, and the interview was brief).

3. Petitioner's second statement

Petitioner further argues that his second statement was obtained in violation of Miranda because: (a) the initial illegal questioning tainted the second interview; and (b) the Spanish-language advisement was defective because it failed to properly inform petitioner that he had a right not to speak and it failed to clearly ask petitioner whether he wished to waive his rights. (See Pet. ¶ 10(d); Trav. at 39-40; Supp. Trav. at 11-14). Petitioner contends that the Spanish-language advisement of "*Usted tiene el derecho de no decir nada*" translates literally to, "You have the right not to say nothing."

Petitioner argues that, because of the use of a double negative in the phrase, he was advised that he had "a right to speak," rather than that he had a right to remain silent. (Trav. at 39-40).

First, the Court's finding above that petitioner's initial statement was not obtained in violation of petitioner's Miranda rights is dispositive of his claim that the second interview was tainted by the initial questioning. Second, the Court concurs with the finding of the state trial court that petitioner was advised of his rights under Miranda, agreed that he understood his rights, and then knowingly agreed to answer questions. (See RT of July 11, 1996, at 130-57).

A suspect may waive his or her right to silence, but to be valid, a Miranda waiver must be (1) voluntary and (2) knowing and intelligent. See Colorado v. Spring, 479 U.S. 564, 573, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987). A waiver of Miranda rights need not be express; it can be inferred from the words and actions of the suspect. See North Carolina v. Butler, 441 U.S. 369, 373-75, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979); Terrovona v. Kincheloe, 912 F.2d 1176, 1179 (9th Cir. 1990). The state courts' determination as to a knowing and intelligent waiver is a determination of fact. See Amaya-Ruiz v. Stewart, 121 F.3d 486, 495 (9th Cir. 1997) ("The state trial court's finding that [petitioner] knowingly and intelligently waived his Miranda rights is entitled to a presumption of correctness."); Collazo v. Estelle, 940 F.2d 411, 415 (9th Cir. 1991) (en banc) (clarifying that the federal courts give a presumption of correctness to a state court's determination of historical facts underlying a finding that a waiver of Miranda rights was knowing and voluntary).

Here, the evidence establishes that petitioner was advised of his rights in Spanish, that petitioner was asked if he understood each right, and that petitioner appeared to understand his rights. (See 1 CT 59-64; 6 RT 1425-26, 1473). Petitioner supports his claim solely with a copy of a request to the California Court of Appeal seeking judicial notice of a portion of a Spanish/English

dictionary. (See Supp. Trav. at 10-12, Exh. 1). But, even if the Court were to take judicial notice of the requested portion of the dictionary, the definition of each word of the phrase in question taken in isolation does not convey the meaning of the phrase. No specific words are required to render a Miranda warning adequate. See Duckworth v. Eagan, 492 U.S. 195, 202, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989) ("We have never insisted that Miranda warnings be given in the exact form described in that decision.") Petitioner, having been advised of his rights, was asked it he wished to talk. He specifically responded, "Go ahead and ask me questions." (1 CT 63-64; 6 RT 1425-26). To solicit a waiver of a suspect's Miranda rights, a police officer is not required to explicitly ask whether the suspect wishes to waive those rights. See Butler, 441 U.S. at 373 (holding that an express written or oral statement of waiver of the right to remain silent or of the right to counsel is not necessary to establish a waiver); United States v. Cazares, 121 F.3d 1241, 1244 (9th Cir. 1997) (finding a valid waiver "[i]n the absence of evidence that the officers coerced or misled [the defendant] into giving them a statement, and ample proof that the statement was voluntarily given after explanation of the Miranda rights").

Again, the Court is unable to find or conclude that the state court's finding that petitioner gave a valid

waiver of his Miranda rights was contrary to or involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court, or was based on an unreasonable determination of the facts.

**B. Habeas relief is not warranted with respect to Petitioner's instructional error claim.**

Petitioner contends that the trial court erred in instructing the jury on "consciousness of guilt." Petitioner asserts that the opinion of the prosecution's expert witness that petitioner "seemed" to have disguised his voice was insufficient to justify the instruction. Further, petitioner contends that Officer Garcia was unable to testify as to petitioner's "normal voice" because he did not compare petitioner's voice on the day of the arrest to that on the voice exemplar. (See Pet. ¶ 10(e), Add. ¶ 10(e); Trav. at 41-43).

Federal habeas relief is not available for an alleged error in the interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (reiterating that "it is not the province of a federal habeas court to reexamine state court determinations on state law questions"). Thus, to the extent that petitioner merely is contending that the jury instruction should not have been given as a matter of California law, his claim is not cognizable on federal

habeas review. See Estelle, 502 U.S. at 71-72.

To the extent that petitioner is contending that the inclusion of an allegedly erroneous jury instruction violated his federal constitutional rights, to merit relief, petitioner must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process." Estelle, 502 U.S. at 72; Henderson v. Kibbe, 431 U.S. 145, 154-55, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977); Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988). Moreover, the allegedly erroneous instruction must be considered in the context of the trial record and the instructions as a whole. Estelle, supra; see also Cupp v. Naughten, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973).

In rejecting petitioner's instructional error claim, the California Court of Appeal reasoned as follows:

> "Although the trial court had refused to allow the non-expert Officer Garcia [to] give his opinion as to whether Ayon had tried to alter the sound of his voice during the taping of the 1996 exemplar, Garcia was allowed to testify he had spoken to Ayon four or five times on the day he was arrested, and that he thought Ayon's voice on the exemplar sounded very different from those earlier

conversations. Asked how Ayon's tone was different, Garcia testified: 'His voice was different - first of all, he was slouched down in the chair, in that his head was down like this, and then the pitch, his voice dropped. I mean, actually went high, way high. And he wasn't answering questions fluently, basically really choppy.' Ayon's voice 'fluctuated' and '[i]t did not sound like him at all.' Only at the very end of the exemplar taping did Ayon sound like he had in 1995.

"Professor Pena testified that, in one portion of the exemplar, Ayon spoke informally while he was getting instructions on how to do the taping, whereas in another portion Ayon sounded artificial while reading into the tape recorder. Asked if Ayon tried 'to do anything with his voice' on the exemplar, Pena replied: "I don't know if he attempted so much, per se, but his voice seems to be altered, I don't know if by him on purpose, but he was asked to be involved in an activity that is not a conversation situation... He was asked to read. And they tried to... get some voice samples on the basis of reading. [¶] However, the conversations that took place while they were giving him instructions when he was not

reading were more common natural conversations, we had good voice samples of that.'

"Thus, contrary to Ayon's claim, foundational evidence showing possible voice alteration was admitted. CALJIC No. 2.06 requires the jury to first determine if there was evidence of an attempt to suppress evidence - i.e., evidence that Ayon had purposely tried to disguise the sound of his voice on the exemplar; only then could the jury treat this as consciousness of guilt evidence. The trial court properly allowed the jury to make this determination. Moreover, the trial court excluded lay testimony that Ayon had tried to disguise his voice, and the expert Pena testified he could not say if the alterations he heard had been conscious or not." (Ans. Ex. B at B-39 to B-40).

Petitioner argues that neither Professor Pena ("Pena") or Officer Garcia ("Garcia") was able to "articulate what petitioner's 'normal' voice was" and, consequently, both witnesses merely attributed the difference they heard between the taped exemplar and the tapes of the voice captured in the wire tap to petitioner's attempt to disguise his voice. (Trav. at 42-43). However, petitioner has mischaracterized the

evidence. Garcia testified that he was familiar with petitioner's voice because he had spoken with him three or four time on the day of the arrest and also was present when petitioner's voice exemplar was taken. (8 RT 1732-33). Further, Garcia testified that, while the voice exemplar was being recorded, petitioner's voice did not should like it had on the day of his arrest, except at one point at the very end. (Id. at 1734-35). Pena testified that the voice on the exemplar "seems to be altered" during the portion of the exemplar when petitioner was reading passages. But Pena also testified that there was a "good voice sample" on the exemplar that captured a more "natural" conversation with petitioner prior to when he was asked to read. (4 RT 906). Based on the conversation captured on the exemplar and that from the intercepted calls, Pena was able to form an opinion that the voices were from the same person. (Id. at 906, 918).

The record reflects that the jury was instructed, in relevant part, as follows:

> "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by disguising his voice, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its

weight and significance, if any, are matters for your consideration." (10 RT 2203).

Thus, the jury was instructed that the weight and significance of any attempt by petitioner to disguise his voice was a matter for their consideration. (10 RT 2203). Further, the jury also was advised that they were the "sole judges of the believability of a witness and the weight to be given the testimony of each witness" and "the sole judges of the credibility of witnesses"; that they were "not bound to accept an expert opinion as conclusive"; and that they could "disregard any such opinion if [they found] it to be unreasonable." (See 10 RT 2204, 2208, 2237). Consequently, the Court has no basis for finding or concluding that the consciousness of guilt instruction challenged by petitioner, when considered in the context of the trial record and the instructions as a whole, "so infected the entire trial that the resulting conviction violated due process."

The Court therefore finds and concludes that the California courts' rejection of this claim neither was contrary to nor involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court.

C. **Habeas relief is not warranted with respect to petitioner's ineffective assistance of**

**counsel claims.**

Petitioner contends that his trial counsel provided ineffective assistance in the following respects: (1) failing to interview and present the testimony of petitioner's co-conspirators (see Pet.¶ 10(a), Add.¶ 10(a); Trav. at 4-17); (2) failing to move to suppress evidence of other crimes seized in an unrelated case, failing to object to the admission of the evidence of other crimes, and failing to request a jury instruction limiting consideration of that evidence (see Pet. ¶ 10(b), Add.¶ 10(b); Trav. at 17-27; Supp. Trav. at 3-8); and (3) failing to present the testimony of an expert in voice comparisons (see Pet. ¶10(c), Add.¶ 10(c); Trav. at 28-32).

In Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court held that there are two components to an ineffective assistance of counsel claim: "deficient performance" and "prejudice."

"Deficient performance" in this context means unreasonable representation falling below professional norms prevailing at the time of trial. See Strickland, 466 U.S. at 688-89. To show "deficient performance," petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment." See 466 U.S. at 690. Further, petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The Court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." Id. The Supreme Court in Strickland recognized that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Accordingly, to overturn the strong presumption of adequate assistance, petitioner must demonstrate that "the challenged action cannot reasonably be considered sound trial strategy under the circumstances of the case." Lord v. Wood, 184 F.3d 1083, 1085 (9th Cir.1999), cert. denied, 528 U.S. 1198 (2000); see also Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) ("Counsel's competence, however, is presumed, and [petitioner] must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." (internal citation omitted)).

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, petitioner must

affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. See also Lockhart v. Fretwell, 506 U.S. 364, 372 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)(noting that the "prejudice" component "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair").

It is unnecessary to address both Strickland requirements if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ...that course should be followed.") see also Williams v. Calderon, 52 F.3d 1465, 1470 n.3 (9th Cir. 1995), cert. denied, 516 U.S. 1124 (1996).

1. trial counsel's failure to interview and present the testimony of petitioner's co-conspirators.

Petitioner contends that his trial counsel was ineffective for failing to interview and present the exculpatory testimony of petitioner's co-conspirators. According to petitioner, three of the men who were arrested at the same time as petitioner (all of whom eventually pleaded guilty to charges of conspiracy) as

well as the man from whom petitioner was accused of receiving cocaine were available to testify at the time of trial and would have testified that petitioner was not involved in the drug conspiracy and was not the person identified as "Pancho" on the intercepted telephone conversations. (See Pet. ¶ 10(a), Add.¶ 10(a); Trav. at 4-17). In support of this claim, petitioner initially adduced the same declarations of three of the co-conspirators, Roberto Ramirez ("Ramirez"), Efrain Mendoza Larios ("Larios"), and Juan Chavez Ayon ("Juan Ayon"), and a declaration from an interpreter present during an interview with Rafael Alapizco ("Alapizco") that he had provided to the state courts. In the declarations from the three co-conspirators, each attested that petitioner was not the man identified as "Pancho" on the tapes, was not involved in the drug transactions on November 3 and 5, 1995, and was at the residence at 2641 E. Jackson to take his girlfriend and baby to the hospital. (See Supp. CT of 12/14/98 at 31-43; Supp. CT of 2/18/99 at 92-108). In the declaration concerning the interview of Alapizco, Alapizco is represented as stating that, after listening to petitioner's voice in the exemplar, he did not believe that petitioner was the "Pancho" to whom he had spoken. (See Supp. CT of 12/14/98 at 41).

At the Court's request, the parties conducted the deposition of Romero, petitioner's trial counsel. At the

Evidentiary Hearing, petitioner presented the testimony of the three co-conspirators, of members of his family, of one of his counsel prior to trial, and of his Strickland expert. Petitioner also testified himself.[11]

In his Post-Hearing Brief, petitioner contends that the finding by the state courts that trial counsel's failure to investigate was a tactical decision was incorrect and unreasonable because there was no evidence presented as to trial counsel's actual reasons. (Petitioner's Brief at 7-8). Additionally, petitioner argues that trial counsel's duty to investigate the co-conspirators was triggered because he had "abundant independent reliable evidence that one or more of the co-conspirators would provide exculpatory evidence." (Petitioner's Brief at 2). Because trial counsel did not interview the co-conspirators, he failed to discover the "specifics" of the potential exculpatory information and, therefore, his failure to call them as witnesses cannot be objectively reasonable. (Id. at 6-7). Finally, petitioner argues that, as supported by the testimony of his Strickland expert, it was "below the standard of care to reject calling a felon as a witness without first knowing what he would say." [12] (Id. at 7).

---

[11] A new declaration from Alapizco was marked at the Evidentiary Hearing as Evidentiary Hearing Exhibits 9 and 9a.

[12] The Court accords little weight to the opinion of petitioner's Strickland (continued...)

*a. the record below*

Petitioner, having substituted new counsel (Mr. Philip DeMassa ["DeMassa"]) after the jury's verdict and obtained a continuance from the trial court to allow new counsel time to review the trial transcript, first presented this ineffective assistance of counsel claim to the trial court on March 9, 1998, in a motion for a new trial prior to sentencing. (See Supp. CT of 12/14/98 at 18-24; 10 RT 2273-78, 2279-87). In support of the motion, petitioner submitted the declarations (all of which are dated in March of 1998) from three of petitioner's co-conspirators (Ramirez, Larios, and Juan Ayon), as well as a declaration from the interpreter at an interview conducted on February 24, 1998, by DeMassa of Alapizco while Alapizco was incarcerated in federal prison in Oklahoma. (See Supp. CT of 12/14/98 at 31-

---

(...continued)

expert based on his own acknowledged unfamiliarity with Strickland (see 5 Evidentiary Hearing Reporter's Transcript ("EHRT") at 657 (he did not know the name of the "leading United States Supreme Court authority on the duty of counsel to investigate"), 658 (he has not read Strickland "in a very long time")), and the fact that he articulated the incorrect standard for reviewing counsel's performance under Strickland (id. at 615-16 (competent counsel must "explore every possible alternative and way of defending your client"), 655 (counsel has an obligation to "explore every avenue of investigation")). Under Strickland, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary ." 466 U.S. at 691. Thus, "counsel need not interview every possible witness to have performed proficiently." Riley v. Payne, 352 F.3d 1313, 1318 (9th Cir. 2003), cert. denied, 160 L. Ed. 2d 200, 125 S. Ct. 39 (U.S. 2004).

43; Supp. CT of 2/18/99 at 99-108). During a hearing in the trial court, petitioner argued extensively that petitioner's former trial counsel was ineffective for failing to interview the co-conspirators and that their testimony would establish that petitioner was innocent. (See 10 RT 2310-355). Petitioner argued that the witnesses were available and would have testified that they were familiar with petitioner's voice, that petitioner was not the "Pancho" on the intercepted telephone calls, and that he was not involved in the drug deals at 2639 E. Jackson. Further, petitioner argued that trial counsel could not have made a tactical decision not to call the witnesses because he never interviewed them. (See 10 RT 2298-2300, 2305, 2310-13, 2338-50, 2354-55).

In denying petitioner's motion, the trial court remarked that she had "sat through this entire trial" and thought that trial counsel "did a more than adequate and lawyer-like job on this case," and "was extremely and acutely aware of all the facts of this case and of all of the witnesses and what they would have testified to." In addition, the trial court noted that "it is a tactical decision whether to call witnesses who are felons and who are incarcerated to make certain statements." (See 10 RT 2309-10, 2340, 2355). Petitioner then filed a motion for reconsideration of his motion for a new trial, arguing that the trial court appeared not to have considered the declarations petitioner had filed in support of his motion

for a new trial. (See Supp. CT of 2/18/99 at 110-10 RT 2378-79). On April 3, 1998,the trial court denied that motion as well. (See 10 RT 2378-79).

In his direct appeal, petitioner asserted that the trial court had erred in denying his motion for a new trial based on ineffective assistance of counsel in failing to interview and to call the co-conspirators. (See Ans. Exh. B at B-33, B-45). In rejecting petitioner's claim, the California Court of Appeal reasoned:

> "[Petitioner] argues there could be no satisfactory explanation here because these 'witness' exculpatory testimony went to the core of [petitioner's] defense' -i.e., that he was innocently at the house and had nothing to do with any drug operation that may have been going on there. But according to [petitioner], these five men had already pled guilty and been sentenced by the time he came to trial. This fact undermined their credibility because it meant they had nothing to lose by falsely exonerating [petitioner]. [¶] The trial court noted there was no indication counsel had been unaware of these witnesses or of what they would have purportedly testified to. [Petitioner] points to nothing in the record that would rebut the presumption trial counsel's

failure to interview these men was a reasonable tactical decision." (Id. at B-47) (internal citations omitted).

Next, petitioner raised the same claim in his habeas petitions to the California Superior Court and, subsequently, to the California Court of Appeal and the California Supreme Court. (See Lodgment 3-5). In support of the claim, petitioner adduced the same declarations that he had filed with the Superior Court in support of his motion for a new trial. (See Lodgment 3 at 14-21, Exhs. 6-9; Lodgment 5, Exhs. 6-9). In addition, petitioner adduced the declaration of attorney Roger Rosen ("Rosen") as an ostensible Strickland expert. Rosen asserted in his declaration that, based on the declarations of Ramirez, Larios, Juan Ayon, and Morales (the interpreter for the interview with Alapizco), the "witnesses possessed critical exculpatory evidence" and that the failure to interview and call the witnesses "constituted a failure to act in a manner expected of reasonably competent attorneys acting as a diligent advocate." (See Lodgment 3 at 29, Exh. 19 ¶ 6; Lodgment 5, Exh. 19 ¶ 6). Each of the habeas petitions was denied in turn. (See Ans. Exhs. F, H, J).

*b.* ***The state courts' determination that trial counsel's failure to interview and call the witnesses was a reasonable tactical decision***

*was not objectively unreasonable.*

Preliminarily, the Court rejects petitioner's contention that, because the state courts did not afford petitioner an evidentiary hearing in deciding his state-court habeas petitions, and the state trial court did not allow petitioner to present his witnesses, the decisions of the state courts were unreasonable and, by implication, not entitled to deference by this Court. (See Trav. at 5-6, 8-10; Petitioner's Brief at 7-8, 18). In Lambert v. Blodgett, 393 F.3d 943 (9th Cir. 2004), the Ninth Circuit explicitly rejected the argument that an evidentiary hearing is necessary to trigger AEDPA deference. See 393 F.3d at 966 ("we will not read into 'adjudicated on the merits' a requirement that the state have conducted an evidentiary hearing, or indeed, any particular kind of hearing"). Here, the California Court of Appeal rejected this ineffective assistance of counsel claim in petitioner's direct appeal on the merits in a reasoned decision. In doing so, the Court of Appeal adopted the reasoning of the state trial court, which had afforded petitioner a hearing on the merits of his claim. Thus, the opinion of the California Court of Appeal is the relevant state-court decision because the California Supreme Court denied petitioner's subsequent Petition for Review, as well as his later Petition for Review of the Court of Appeal's unexplained rejection of his state habeas petition, without comment. See Ylst, 501 U.S. at 803-04; see also Taylor v. Maddox, 366F.3d 992, 999 n.5 (9th Cir.), cert.

denied, 160 L. Ed. 2d 605,125 S. Ct. 809 (2004) (noting that the opinion of the state trial court is relevant where the court of appeal adopted its reasoning).

Further, the Court rejects petitioner's contention that the claim as presented herein contains additional evidence that was not before the California Court of Appeal, thereby rendering its opinion "wrong" and "'irrelevant." (Trav. at 10). Petitioner presented the same declarations from the co-conspirators obtained in March 1998 in connection with his motion for a new trial to the state trial court, to the Court of Appeal in his direct review, to the state courts in all three of his state court habeas petitions, and to this Court. The only additional piece of evidence relevant to this claim that was not presented to the Court of Appeal on direct review is the declaration of petitioner's Strickland expert that was based on the declarations of the co-conspirators. (See Lodgment 3 at 29, Exh. 19 ¶ 6; Lodgment 5, Exh. 19 ¶ 6). While that additional piece of evidence was included in petitioner's successive state court habeas petitions raising the same claim, it did not undermine the Court of Appeal's reasoning. Accordingly, the Court of Appeal decision on direct review still qualifies as the relevant "last reasoned decision." See, e.g., Buckley v. Terhune, 397 F.3d 1149, 1155 n.4 (9th Cir. 2005).

Although the record before this Court has been

augmented with the deposition of trial counsel and the live testimony of the witnesses whose declarations were submitted to the state courts, the Court concurs with the reasoning and conclusion of the state courts that trial counsel was aware of the coconspirators, and of what they purportedly would have testified to; and that trial counsel made a reasonable tactical decision not to interview or call those witnesses. Accordingly, the Court is unable to find or conclude that the state courts' determination that petitioner had failed to make the requisite showing of deficient performance was an unreasonable application of the Strickland standard.

*i. information known to trial counsel*

At his deposition, Romero testified that he had had multiple discussions with petitioner and petitioner's family members during which they discussed the individuals who were arrested with petitioner and during which petitioner had provided him with the "history" of the men. (Romero Depo. at 14-15, 17, 81). Romero had reviewed the transcript of the first preliminary hearing in the case involving the co-conspirators, and he had reviewed the police reports containing statements by petitioner and the co-conspirators, as well as other evidence against the co-defendants. (Romero Depo. at 15-19). Additionally, Romero had discussed with petitioner's former counsel (Steingard) whether it would benefit petitioner's case to call them as witnesses.

According to Romero, Steingard was "in staunch opposition" and felt that the testimony of the co-conspirators "would be more damaging because of their prior pleas" and their involvement with the drug conspiracy. (Romero Depo. at 14-15, 76-77). Romero further testified that petitioner had agreed that the testimony of the co-conspirators would not be beneficial and that petitioner had requested that they not be called as witnesses. (Depo. at 18, 71-73). Romero believed that calling the co-conspirators as witnesses was "a potential quagmire, fire bomb" because the co-conspirators had plead guilty to possession of "hundreds and hundreds of kilos of cocaine and hundreds of thousands of dollars," they were friends and relatives of petitioner, and petitioner had made many trips to Las Vegas with Ramirez. (Romero Depo. at 17-19, 72). Also, Romero believed that, even if the co-conspirators testified that petitioner was "totally innocent," it is "not a good idea to bring individuals who pled guilty to an offense and try to exculpate their codefendant." (Romero Depo. at 18). Ultimately, Romero believed that it was a tactical decision not to call the co-conspirators and he thought that "'any potential benefit" was "clearly outweighed by the potential prejudice" of their testimony. (Romero Depo. at 18, 73-74).

The testimony of Romero was, to some extent, contradicted by other evidence in the record. At the

Evidentiary Hearing, petitioner, as well as his wife, testified that they had asked Romero to interview the men arrested with petitioner. (1 EHRT 170-72; 4 EHRT 482-84). Further, Steingard denied telling Romero that he was "staunchly opposed to calling the codefendants" as witnesses for petitioner, or recommending that Romero not interview the co-conspirators. (Id. at 281, 285-88). However, Steingard confirmed that he had shared with Romero his awareness that some of the co-conspirators "were prepared to testify as exculpatory witnesses." (3 EHRT 258-62, 270-77). Additionally, Steingard testified that he had shared his knowledge of the case with Romero and that he recalled that the police reports contained damaging information about the potential witnesses. (Id. at 274-77, 313-14). Steingard testified that, at the time he left the case, he was still in the process of gathering information that would allow him to make the decision about calling the potential witnesses to testify and that he would have had to "weigh the pros and cons of calling either [Ramirez or Larios] as a witness for the defense." He testified that he would have considered such factors as the co-conspirators' prior convictions, whether there was a familial relationship with petitioner, and whether one of them was a leader and the other a follower, in deciding whether it would be beneficial to call that person as a witness. (Id. at 288-89, 293, 307-09). Finally, irrespective of Romero's own recollection of his reasons for not interviewing the co-

conspirators, the standard for evaluating trial counsel's actions under Strickland is an objective one. See Wiggins v. Smith, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) ("[i]n assessing counsel's investigation, we must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms" (internal quotation marks omitted)).

Moreover, the police report that was in Romero's file (which Romero testified to having reviewed) contained significant evidence that could have been used to impeach the co-conspirators had they testified on behalf of petitioner. For example, petitioner had denied knowing anyone in the house next door, but his brother was arrested there. Petitioner also denied knowing Ramirez, but evidence was discovered that petitioner, Ramirez, and Juan Ayon had traveled to Las Vegas together in September 1995 (which was a month before Juan Ayon testified that he had arrived in the United States). (See EH, Exh. 115 at 39, 46). Petitioner told the police that Larios was the landlord at 2641 E. Jackson and that he lived there with his wife, but Larios testified that he was renting the house, although he did not recall who the landlord was or how much he paid in rent. (1 EHRT 125-27). The police reports also contained information that Larios had lied about residing at 2641 E. Jackson. (EH Exh. 115 at 3). His sister told the police

that Larios lived with her in the rear house at 1217 N. Mulberry and had done so for the previous 18 months. This was confirmed by the occupant of the front house at 1217 N. Mulberry. (Id. at 14, 16).

In addition, the prosecutor in petitioner's trial testified at the Evidentiary Hearing that he also had been the prosecutor in the case against the other five co-conspirators, at which all of them had pleaded guilty during the testimony of the prosecution's last witness. (4 EHRT 507-09). Because the prosecutor had tried the case against the co-conspirators, he was very familiar with the evidence against them and would have used that information to impeach the co-conspirators had they testified. He was aware that, although Ramirez told the police that be did not know petitioner and petitioner denied knowing Ramirez, there were significant connections between them. Further, in a suppression hearing at his own trial, Ramirez had testified that he did not know petitioner. The prosecutor stated that he would have impeached Ramirez had he testified on behalf of petitioner by showing that he had previously lied under oath. (4 EHRT 517-12, 515-17; 5 EHRT 591-92) Similarly, with respect to Larios, the prosecutor would have impeached his testimony with information that he had lied to the police when he told them that petitioner had arrived at the house at 2641 E. Jackson just a minute before the police had arrived, but this was contradicted

by the police surveillance of the house. Additionally, although Larios said he had been living at the house at 2641 E. Jackson for three months and denied knowing anyone at the house at 2639 E. Jackson, a utility bill for 2639 E. Jackson was found during the search of 2641 E. Jackson. (4 EHRT 517-20). Finally, with respect to Juan Ayon, the prosecutor was aware that he initially had given a false name to the police and had denied knowing petitioner. The investigation had discovered records indicating that Juan Ayon had traveled to Las Vegas with petitioner a number of times. This information was reflected in the police reports that trial counsel had reviewed. (4 EHRT 517-28; EH, Exh. 115 at 7)

Although the testimony of Romero is not entirely credible, it is clear based on (a) Steingard's testimony that he had shared his knowledge about the case with Romero before he left the case, and (b) Steingard's recollection that he had told Romero that he was "aware that there were defendants that were prepared to testify... for the defense," that Romero was aware of the general nature of the potential exculpatory testimony without interviewing the co-conspirators. Even petitioner agrees that his trial counsel had "abundant, independent, reliable evidence" concerning the potential exculpatory testimony of the co-conspirators. (Petitioner's Brief at 2). Further, based on the testimony of the prosecutor at petitioner's trial that he was aware that, during trial,

Romero was considering calling one or more of the co-conspirators to testify on behalf of petitioner (4 EHRT 509-11), it is clear that Romero did evaluate the possibility of calling the co-conspirators. Finally, based on the evidence contained in the preliminary hearing transcript and the police reports, both of which Romero testified he had reviewed, it also is clear that Romero was aware of ample evidence, apart from their drug convictions, by which any testimony offered by the co-conspirators would have been thoroughly impeached. See Denham v. Deed, 954 F.2d 1501, 1505 (9th Cir. 1992) (finding counsel's failure to call an alibi witness a reasonable tactical decision where record supports that counsel was aware of glaring inconsistencies in the proposed testimony).

*ii. testimony of Juan Ayon*

Juan Ayon initially testified at the Evidentiary Hearing that petitioner "is my brother," but then clarified that they just had the same father, but different mothers. (1 EHRT at 71, 96). However, in his declaration submitted to the state courts, Juan Ayon denied that he was the brother of petitioner or that they had the same father or the same mother. (See Lodgment 3, Exh. 8). During the Evidentiary Hearing, Juan Ayon could not recall having been interviewed by petitioner's new counsel in 1998, and did not recall that he had signed any declaration. (1 EHRT at 72-74).

Juan Ayon admitted that he was currently serving time after having pleaded guilty to possession of cocaine. (Id. at 71, 84). Juan Ayon testified that petitioner had not arranged his presence at the house where he was arrested. Rather, when he was on his way to the United States to look for field work, he was hired by two men he first met in Tijuana to take care of the house at 2639 E. Jackson. He knew that cocaine had been brought into the house over the fence from the house next door, but he denied knowing who lived at the house next door. He also denied knowing that his brother was at the house next door at the time both men were arrested, denied that he had ever seen his brother next door, and denied that he told the police that his brother was next door to visit his girlfriend. (Id. at 81-82, 89-95, 102-03).

Further, Juan Ayon testified that he had arrived from Mexico about two weeks before his arrest. (Id. at 71-72). Although he previously had visited petitioner in the United States, and had known him since they were children in Mexico, Juan Ayon was unable to recognize petitioner's voice on the voice exemplar when it was played for him. (Id. at 74-78, 80). Juan Ayon testified that he knew Ramirez, but had only seen him twice before their arrests, once when they went to Las Vegas with petitioner. Juan Ayon recalled that he had traveled to Las Vegas with his brother and Ramirez, but he could not recall when the trip had occurred. (Id. at 99-100).

Based on the information known to petitioner's trial counsel indicating that Juan Ayon would not be a credible witness, Juan Ayon's inability to recognize petitioner's voice on the exemplar, and the inherent implausibility of Juan Ayon's testimony about the mere fortuity of his half-brother being in the house next door to the house where Juan Ayon was guarding the drugs at the time of the drug transaction,[13] the Court has no basis for finding or concluding that the failure to interview and then call Juan Ayon as a witness was an objectively unreasonable tactical decision.

*iii. testimony of Larios*

Larios testified that he pleaded guilty to a conspiracy involving the cocaine at the house at 2639 E. Jackson, but denied having admitted that he was involved with the activities going on there. He denied having any purpose in living at the house at 2641 E. Jackson and

---

13

Petitioner contends the Court's function is not to determine the credibility of petitioner's witnesses and that his witnesses are not required to pass a "credibility filter" at the Evidentiary Hearing. (See Petitioner's Brief Regarding the Alibi Issue). The Court, however, disagrees. See, e.g., Luna v .Cambra, 306 F.3d 954, 961-62 (9th Cir.), amended 311 F.3d 928 (9th Cir. 2002) (finding the testimony of omitted alibi witnesses was consistent and could not be discounted merely due to familial ties); Lord, 184 F.3d at 1095 (in finding that a competent attorney would not have failed to put potential witnesses on the stand, the Ninth Circuit evaluated the credibility of the witnesses based on their affidavits and district court testimony).

denied acting as a look-out for the activities next door. (Id. at 109, 112-13)

Larios testified that he had met petitioner "through a girl" who lived at the house in which he was living, and that this "girl" and petitioner had a child who also lived at the house. But Larios could not remember how he had met the girl and did not recall when she had arrived at the house. (Id. at 112, 114-115). Larios testified that he was renting the house on Jackson, but could not recall who the landlord was, whether he had ever met the landlord, or how much he paid in rent, and admitted that he had no lease. Larios said that petitioner would give the girl money to help out, but she did not help pay the rent, nor did she work. Larios admitted that he did not have a job either, but said the he, and not petitioner, paid the utilities at the house. (Id. at 125-32).

Larios insisted that the cell phone found at 2641 E. Jackson was at the house for about two weeks before petitioner's arrival, but he had never seen anyone use the phone, did not know where the charger was, and did not believe that it had ever rung. (Id. at 123-24, 134-36). Further, Larios testified that he had never seen or heard anyone in the driveway of the house at 2641 E. Jackson, despite the fact that the driveway is readily visible from windows in the house. He had never been to the house at 2639 E. Jackson, and denied every holding any parties at

2641 or having anyone over to play pool. He also denied knowing Ramirez before their arrest. (Id. at 136-38).

Larios said that, on the day he was arrested, the girl was living at the house, but she had left earlier, although he said that petitioner had come to visit her. But Larios told the police that petitioner was coming over to visit his girlfriend, that he was going to take the child to the hospital, and that petitioner was going to take Larios out to lunch. (Id. at 116). When petitioner was arrested, he told the police that he was at the house to take Larios out to lunch (interestingly, at the Evidentiary Hearing, petitioner testified that he was at the house to bring his baby some pampers (4 EHRT 470)). (EH, Exh. 115 at 3). Larios testified that it was not petitioner's voice on the intercepted tapes, although he also testified that he had only spoken to petitioner briefly during the two earlier visits that petitioner had made to the house. (1 EHRT 112, 115-16, 119-22).

Based on the information known to trial counsel indicating that Larios would not be a credible witness, the inherent implausibility of Larios' testimony concerning his presence at 2641 E. Jackson, as well as his willingness to unequivocally state his opinion that petitioner was not the "Pancho" on the intercepted tapes despite his dubious familiarity with petitioner's voice, Larios' improbable testimony that he was unaware of the

illegal activity going on in the house next door, and his disavowal of any involvement in that illegal activity (despite the fact that he pleaded guilty to the conspiracy), the Court has no basis for finding or concluding that the failure to interview and then call Larios was an objectively unreasonable tactical decision.

*iv. testimony of Ramirez*

Ramirez testified that he currently was serving a 24-year sentence after having pleaded guilty to conspiracy to sell cocaine. (1 EHRT 33, 40). He admitted his involvement in the activities at the houses at E. Jackson, but denied that petitioner was involved in the conspiracy.[14]

Ramirez testified that he had known petitioner for

---

14

Ramirez testified that he would have been willing to testify on behalf of petitioner despite the fact that his appeal process was pending at the time and he hoped to win a new trial. (Id. at 34, 38-39, 40-41, 56). Moreover, John Yzurdiaga, trial counsel for Ramirez, testified at the Evidentiary Hearing that Ramirez told him he would be willing to testify on petitioner's behalf. Yzurdiaga recalled that Ramirez pleaded guilty in March of 1996 and that Ramirez offered to testify for petitioner after Ramirez had been sentenced. Yzurdiaga confirmed that Ramirez did appeal the ruling on a motion to suppress evidence despite his guilty plea. Although Yzurdiaga explained to Ramirez that his testimony on behalf of petitioner might prejudice Ramirez if he were to win on appeal, Ramirez was determined to testify for petitioner and was not concerned about any risk to himself. (4 EHRT 424-32). Consequently, the Court finds that Ramirez was available to testify.

several years at the time of his arrest and did not know petitioner by the name of "Pancho." He believed that he had met petitioner at a bar in Compton, but he did not remember the name of the bar. He testified that petitioner had a business and that he had sometimes worked for petitioner carrying barrels of oil, canned goods, and shoes. Ramirez also had gone to Las Vegas with petitioner, but could not recall how often. (Id. at 32-33, 43). Ramirez denied transporting cocaine at the request of petitioner and denied ever working for petitioner in any capacity other than transporting goods for his business. (Id. at 49).

On the day of his arrest, Ramirez did not enter the house at 2641 E. Jackson and did not see petitioner. Ramirez knew that Larios took care of the house at 2641, and expected to be warned by Larios if anything went wrong. But he had not been warned of any problems the day of his arrest. (Id. at 30-32,56-58,61). Ramirez had used the driveway at 2641 to load drugs maybe 6 to 8 times. (Id. at 59). Further, Ramirez testified that there was a pool table at 2641 where Ramirez used to "hang out" and play pool. Despite the fact that he had testified that Larios, who was living at 2641, was the lookout for the drug transactions and that petitioner was not involved in the drug activities, Ramirez also testified that he had played pool with petitioner multiple times at the house at 2641 E. Jackson. Further, Ramirez knew that petitioner

would come to the house to visit his girlfriend and his daughter. (Id. at 62-63, 65).

Additionally, Ramirez testified that he had known Larios for about 8-10 months at the time of their arrest. He and Ramirez had both carried drugs for a man whom Ramirez initially refused to identify because he "would get into trouble." He testified that he did know someone named "Pancho," but he did not call him "Pancho." He had spoken to the man known as "Pancho" on the telephone 30 to 40 times. He had worked for "Pancho" transporting drugs about 20 times, maybe more, during the ten months before his arrest. (Id. at 44-48). Ramirez testified that he was afraid to tell "Pancho's " true name. (Id. at 49). Ramirez then testified that the last name of the man called "Pancho" was "Aviles." He testified that, when he was interviewed by petitioner's attorney in jail and petitioner's attorney played the tapes of the intercepted conversations, he told petitioner's attorney that the voice on the tapes was the voice of the person he had worked for. (Id. at 51-52). This was the first time he knew that the person he worked for was called "Pancho." (Id. at 46-47, 51). But Ramirez also provided contradictory testimony by stating that his trial counsel knew about "Pancho" at the time of Ramirez' trial and his trial counsel warned him not to reveal the person's "full name." He was afraid at the time of his trial to reveal the identify of "Pancho." (Id. at 53-55). Further,

Ramirez said that, if he had testified at petitioner's trial, he would only have revealed "Pancho's" name as "Aviles." (Id. at 65-66).

Based on the information known to trial counsel indicating that Ramirez would not be a credible witness, the evasiveness of Ramirez' identification of the "Pancho" on the intercepted tapes, and Ramirez' improbable testimony about petitioner's frequent presence at a house used as a lookout for drug transactions that petitioner supposedly was not aware of, along with Ramirez' testimony that he would have been warned of any problem but was not warned the day of his arrest despite petitioner's presence, the Court has no basis for finding or concluding that the failure to interview and then call Ramirez was an objectively unreasonable tactical decision.

*v. Alapizco*

In lieu of calling Alapizco, a federal inmate presently incarcerated in Beaumont, Texas, petitioner submitted a declaration signed by Alapizco on May 24, 2004, concerning an interview that petitioner' s counsel had conducted with Alapizco in 1998. In the declaration, which was translated from Spanish into English by petitioner's paralegal (see 1 EHRT 23), Alapizco stated that, had he been called as a witness at petitioner's state criminal trial, "I would have asserted my right not to

testify under the Fifth Amendment to the United States Constitution." (EH, Exh. 9b ¶5). Although petitioner argued at the Evidentiary Hearing that Alapizco had no "legal right to assert the Fifth Amendment at that point" (1 EHRT 28), this argument does not establish that the witness was willing to testify. The Court cannot speculate regarding whether, had Alapizco been called as a witness at petitioner's trial, the trial court would have honored Alapizco's assertion of his Fifth Amendment privilege. Nor can the Court speculate regarding whether, if the privilege had not been honored, Alapizco would have provided testimony consistent with his declaration. Further, at the time of petitioner's trial, Alapizco's federal case still was pending. Alapizco was not sentenced until November 21, 1997, which was during petitioner's trial. On December 1, 1997, Alapizco filed a Notice of Appeal, and his conviction was not affirmed on appeal until April 7, 1998. (See Lodgment 3, Exh.10 at 3-4). Consequently, the Court finds that petitioner has failed to show that this witness was available.

Moreover, even if Alapizco had testified without asserting his Fifth Amendment privilege, and had provided testimony consistent with his declaration, such testimony would not have been exculpatory. In his declaration, Alapizco merely stated that, after listening to copies of the intercepted conversations and listening to

the voice exemplar, he "did not believe that the 'Pancho' that I spoke to on the tapes was [petitioner] who was on the voice exemplar." (EH Exh. 9b ¶ 4). Because petitioner has adduced no evidence that Alapizco was familiar with petitioner's voice apart from the brief intercepted telephone conversations, Alapizco's opinion concerning the exemplar of petitioner's voice that was not taped during a telephone conversation lacks foundation. Further, and more significantly, Alapizco, who indicated that he knew the person he was talking to during the intercepted calls was "Pancho," did not state that he knew that this "Pancho'" was someone other than petitioner. (Id. ¶¶ 3-4).

Based on the lack of evidence that this witness was available or would have provided exculpatory testimony, the Court has no basis for finding or concluding that the failure to interview and then call Alapizco was an objectively unreasonable tactical decision.

c. *Petitioner has failed to make the requisite showing of prejudice.*

Even assuming, arguendo, that trial counsel's failure to interview and call the co-conspirators was not the result of an objectively reasonable tactical decision, the Court finds that petitioner has failed to make the requisite showing that, had his trial counsel interviewed and called Ramirez, Larios, Juan Ayon, and Alapizco as

witnesses, there is a reasonable probability that the outcome of the trial would have been different.[15] In assessing the prejudicial effect of trial counsel's alleged error, the Court must consider the excluded evidence "in light of the strength of the government's case." Rios v. Rocha, 299 F.3d 796, 808-09 (9th Cir. 2002) (quoting Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986)); see also Lord, 184 F.3d at 1095.

Here, petitioner argues that the testimony of Ramirez "exonerated petitioner from illegal activity"; that Alapizco was a "'critical defense witness"; that Juan Ayon testified that petitioner "was not involved in the narcotics activity at the house where the drugs were seized"; and that Larios knew that petitioner was present at 2641 E. Jackson to take his child to the hospital. (See Petitioner's Brief at 9-11). However, petitioner has failed to convince the Court of the exculpatory value of these witnesses' testimony, because having listened to their testimony and having observed their demeanor while

---

15

Because the state courts did not reach the prejudice prong of this claim, the Court must review the issue de novo. See Wiggins, 123 S. Ct. at 2542 (finding that "review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the Strickland analysis"); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002), cert. denied, 539 U.S. 916 (2003); see also Nulph v. Cook, 333 F.3d 1052,1057 (9th Cir. 2003) (review is de novo if the state court did not issue a decision on the merits of petitioner's claims).

testifying, the Court does not find them to be creditworthy witnesses.

Moreover, the state introduced multiple pieces of evidence that, as the prosecutor argued in closing, "fit in like a puzzle" to create a strong and convincing case against petitioner. (9 RT 2059). First, apart from the voice identification, the evidence established numerous connections between petitioner and the "Pancho" on the intercepted telephone calls made by Alapizco to arrange the drug transaction. A federal wiretap of a telephone registered to Alapizco (213-598-6102), captured calls from Mexico on November 3, 1995, instructing Alapizco to "give the 300 to the same person you gave to last week." (3 RT 595, 600, 689-90; 8 RT 1787). Alapizco then contacted an individual named "Pancho" three times at telephone number 213-999-2958. (3 RT 608, 609-11, 698-704,707). This telephone number was assigned to the cell phone found on the couch at 2641 E. Jackson when petitioner was arrested. Detective Dave Marzullo from the Drug Enforcement Agency testified that individuals arranging drug transactions used nicknames during telephone calls in case the telephone calls were intercepted. (3 RT 589-92). Detective Marzullo also testified that, when Alapizco was arrested, he had a notebook in his possession in which the name "Pancho" with a telephone number of "999-2958," along with the number "500" (a probable reference to 500 kilos

of cocaine), were written. (3 RT 612-13). Testimony was offered that "Pancho" was a common nickname for the name "Francisco." (4 RT 845; 5 RT 1241). Further, Deputy Sheriff John Ortega testified that, at the time of petitioner's arrest, when he asked petitioner what his name was, petitioner first responded "Francisco," then said "Pancho," and finally said "Francisco Ayon." (5 RT 1210-13, 1218).

Further, prior to petitioner's arrest, a surveillance was being conducted by a Regional Narcotics Suppression Program of the house located at 2641 E. Jackson in Carson, where petitioner ultimately was arrested. Police Officer Scott McKnight took over the surveillance at approximately 9:40 a.m. on November 5, 1995. (4 RT 1076-79). The first vehicle to arrive at that location after he commenced his surveillance was a white Toyota Camry that arrived at approximately 10:20 a.m. that morning. (4 RT 1079). The only person in the vehicle was petitioner. Petitioner exited the car, walked to the front door of the house at 2641, and entered the house. He did not appear to be carrying anything. (4 RT 1080-81). The next vehicle to arrive at the residence was a gray Ford Tempo or Escort that was being driven by Ramirez and entered the driveway of 2641 that morning between 10:40 and 10:50. (4 RT 1082-84). No one other than petitioner was seen to enter the residence at any time from November 3, 1995, until the police entered

the house to search it at approximately 11:45 a.m. on November 5, 1995. (5 RT 1184-85, 1192, 1209, 1250; 6 RT 1395-96, 1754-56). When the residence was searched on November 5, 1995, police found a cell phone on the sofa in the front room. (5 RT 1216; 7 RT 1766). The telephone number for the cell phone was 213-999-2958, the same number called by Alapizco to arrange the drug deal. (7 RT 1684; 9 RT 2043). No battery charger for the cell phone was found in the search of the residence at 2641 Jackson. (7 RT 1780-81). When Deputy Sheriff Rodolfo Garcia interviewed petitioner at the residence at the time of his arrest, petitioner told Deputy Garcia that his cell phone number was 213-999-2957, which is just one number different from the number of the cell phone found at the residence. (6 RT 1414). Moreover, the records for the number 999-2957 do not reflect any calls linked in any way to petitioner's business or family members. (8 RT 1845-46).

Further, the records of calls made to and from the 999-2958 cell phone on the morning of November 5, 1995, establish that the cell phone was located in the vicinity of 2641 E. Jackson from at least 11:35 a.m., but was not in that vicinity prior to 9:30 that morning. (8 RT 1691-93, 1695-96, 1697). At 11:41 a.m., the cell phone found at 2639 E. Jackson made a completed call to 999-2958; both phones used a cell site that placed the phones in the vicinity of E. Jackson. (8 RT 1693-95). At 11:35

a.m., a call was made from the 999-2958 phone to a number (310-635-2556) that belonged to J&F Transportation, which was petitioner's business. (8 RT 1687, 1696; 9 RT 1973, 1977). At 11:42 a.m., at approximately the time that the police approached the house, an incomplete call was made on the 999-2958 phone. Both of these calls used a cell site that placed the phone in the vicinity of E. Jackson. (8 RT 1695-97). But earlier that same morning, a call that was placed at 9:33 from the 999-2958 phone to telephone number 760-7569 (which is the number for the cell phone found with Ramirez when he was arrested later that morning) used a cell site that was located approximately 12 miles from the residence at 2641 E. Jackson. (8 RT 1694, 1697-98). According to testimony from Airtouch Cellular, due to the distance to the cell site and the number of other cell sites in the area, it is not possible that the call made at 9:33 a.m. from the 999-2958 phone could have been placed while the phone was located at 2641 E. 28 Jackson. (8 RT 1698-99). Consequently, the evidence established that the 999-2958 phone must have been brought to the house at 2641 East Jackson after 9:30 a.m. on November 5, 1995. Petitioner was the only person seen to have entered the house after that time.

Additionally, the records of calls made on the 999-2958 phone provide overwhelming evidence linking the cell phone to petitioner. First, records of calls made

from the 999-2958 phone indicate that many calls used a Buena Park cell site, which would be the site utilized if a call were made from 5521 Kenwood Avenue in Buena Park, which was the address provided to the Buena Park school district for petitioner. (8 RT 1688-89, 1702-03, 1798). Further, written on the back of petitioner's business card found on petitioner at the time of his arrest were the word "casa" and the telephone number 712-670-0604, which is the number for the Buena Park house. (8 RT 1798-1800). Second, telephone calls from the 999-2958 phone were placed to the same phone number in Mexico that was called several times from a room registered to Francisco Chavez at the Harrah's Hotel in Las Vegas on August 27, 1994. (8 RT 1722- 23, 1798). The same number in Mexico also was called from the phone at the Buena Park address identified as petitioner's residence. (8 RT 1798). Third, numerous calls were placed on the cell phone during the period from November 3 to November 5, 1995, to 310-635-2556, the number for petitioner's business. (8 RT 1796-97). Fourth, at the time of petitioner's arrest, he was found to have a notation of a phone number on a business card, 760-5823, to which four calls had been placed on the cell phone. (8 RT 1799). Fifth, the phone records indicate that two calls (at 10:52 a.m. and 11:12 a.m.) were made to Paelli Jones Tire Dealership on October 19, 1995, the same day the Toyota Camry that petitioner was observed to be driving on November 5,

1995, was serviced by that dealership. (4 RT 1079; 8 RT 1800, 1805-06). Sixth, the passenger records for Southwest Airlines indicate that a Francisco Chavez, along with Pedro Chavez, Jesus Gomez, and Ramirez, were passengers on a flight from Los Angeles to Las Vegas on October 19, 1995, that was scheduled to depart at 6:20 p.m., and returned on a 4:55 p.m. flight from Las Vegas on October 20, 1995, which would have arrived in Los Angeles at approximately 6:30 that evening. (6 RT 1500-01). The records for the 999-2958 cell phone indicate that the last call made on October 19th was placed at 4:55 p.m., less than an hour and a half before the flight to Las Vegas, and that no further calls were placed on the phone until 7:39 p.m. on October 20. 1995, shortly after petitioner had returned from Las Vegas. (8 RT 1806-08). Seventh, at the time of his arrest petitioner was found to have a business card containing a notation of a partial number for a number in Mexico that had been called from the cell phone on October 20, 1995. (8 RT 1808-09). Eighth, petitioner was in Mexico on October 26, 1995, and no calls were made on the 999-2958 number that day. However, the records indicate that a series of calls were made on the cell phone in a northward progression on October 27, 1995, including calls to 760-5823 (a number found in plaintiff's wallet), his brother Juan Ayon (805-849-5713), his home in Buena Park (670-0604), and his business phone. (6 RT 1434-36 1485-86; 7 RT 1659-65; 8 RT 1685-90, 1810-

11).

Moreover, there are numerous connections between the cell phone and the other conspirators. The 999-2958 cell phone was only in service for about one month before petitioner's arrest. (8 RT 1803,1805). During that time, four calls were made to it from the cell phone found at 2639 E. Jackson (213-503-3795), including two calls that were made from the vicinity of East Jackson at 11:24 and 11:41 on the morning of November 5, 1995. (5 RT 1137; 8 RT 1693-94, 1804; 9 RT 2043). Although petitioner denied knowing Ramirez when questioned at the time of his arrest (6 RT 1426), just between November 3, and November 5,1995, there were 14 calls made on the 999-2958 cell phone to the cell phone that was found with Ramirez at the time of his arrest. (8 RT 1691, 1787, 1797). Four minutes after the 999-2958 phone received a call from Alapizco at 1:59 p.m. on November 4, 1995, in which Alapizco tells Pancho that they should meet at the hamburger stand, a call was placed on that phone to a hard line belonging to the wife of Ramirez. (8R T 1789-90). Later that day, Alapizco called the 999-2958 phone and made plans to retrieve his van the following day. (8 RT 1793). Immediately thereafter, the 999-2958 cell phone was used to place a call to the 760-7659 cell phone found with Ramirez at the time of his arrest. (8 RT 1793). Further, the phone was used several times to call a number for a Gabriella

Gallardo, who is the mother of Ramirez' girlfriend, and several times to call the number given by Juan Ayon to the DMV. (7 RT 1569-70; 8 RT 1684-87, 1797, 1800). Finally, on the afternoon of October 27, 1995, there were several unanswered calls to the 999-2958 attempted from Alapizco's phone number. (3 RT 595, 8 RT 1689)

In addition to telephone records, there are numerous other connections between petitioner and the co-conspirators. At the time of his arrest, petitioner was found to possess a business card on which was written a phone number that belonged to the wife of Ramirez. (8 RT 1800-01). Detective Dove testified that Ramirez had a previous cell phone with a number of 213-700-3805, and that the same number was found on petitioner at the time of his arrest. (8 RT 1802). Petitioner and Ramirez traveled together to Las Vegas on at least two occasions, September 29 to 30, 1995, and October 19 to 20, 1995. (5 RT 1495-1501). In Las Vegas, Ramirez gave Harrah's the same address and telephone number as did petitioner. (7 RT 1626-27). Petitioner made 22 trips to Harrah's in 1994 and 1995. At Harrah's, petitioner had two "gold cards" that are used to track gaming activity. His second card also listed Juan Chavez on the account and reflected the same date of birth for Juan Chavez as that on the driver's license belonging to Juan Chavez Ayon. (7 RT 1612-20).

At the time of his arrest, petitioner disavowed any knowledge of the house next door (6 RT 1426), but Jesus Lara, who was arrested at 2639 E. Jackson, purchased a baby crib on October 27, 1995, that was found at 2641 E. Jackson on the day of petitioner's arrest and was identified by petitioner's girlfriend as having been given to her by petitioner. (6 RT 1514-16; 9 RT 1928-29). Further, a water bill for 2639 E. Jackson was found at 2641 E. Jackson. (8 RT 1764-65). A license plate that was found in the garage by the owner of 2641 E. Jackson when she moved back into the property after the arrest was registered with the DMV as belonging to petitioner. (8 RT 1811-12; 9 RT 2047). The Toyota vehicle driven by petitioner was registered to an address on Domart Street, where Socorro Gillardo, who told police that she was Ramirez' girlfriend, lived. A search of that address revealed a "citation" for Ramirez, and plane tickets for September 20, 1995, to Las Vegas for petitioner, Juan Chavez, Gillardo, and Ramirez. (6 RT 1430-33; 8 RT 1791-92; 10 RT 2152). Jesus Lara and Jose Ontiveros, who were arrested at 2639 E. Jackson, each gave police their address as 1217 Mulberry in Compton. The DMV records indicate that 1217 Mulberry is listed as the address for Larios, as well as for Jesus Lara. Records indicate that petitioner paid the utilities bills and fire insurance on that property, at least at times. Further, petitioner's girlfriend testified that she lived at 1217 Mulberry with her cousin, Guadalupe Ontiveros, from

1993 until after petitioner's arrest, and that petitioner visited her there. (5 RT 1120; 6 RT 1381-82, 1423-25; 9 RT 1888-90, 1916-19, 1931, 1963). Petitioner, Juan Ayon, and Ramirez all used the Mulberry Street address at times when staying at Harrah's in 1995. A witness for petitioner testified that petitioner resided at 1217 Mulberry from 1981 to 1991, while petitioner's half-brother, Nicolas Chavez Pena lived there after petitioner. Additionally, the Mulberry Street address was listed with the Buena Park School District as petitioner's former residence. (6 RT 1417-18; 7 RT 1617-19, 1621, 1626-27; 9 RT 1951-52, 1954-56, 1966).

Finally, evidence was introduced that petitioner had considerable wealth. Petitioner indicated that he was a partner in a business, but it made little profit. (6 RT 1414, 1419; 9 RT 1973-77, 1986-87). However, petitioner and his wife owned at least five properties, and records were found linking petitioner to several hundred thousand dollars in wire transfers to Mexico. (6 RT 1643-52; 9 RT 1882-88). Further, the records from Harrah's in Las Vegas indicated that petitioner gambled a total of $511,040 during his visits in 1994, and a total of $301,473 during his visits in 1995. (7 RT 1622-23). The records at Harrah's indicate that petitioner lost $17,529 in 1994, and won only $3,195 in 1995. (7 RT 1624).

Given the strength of the prosecution's case against petitioner compared to the implausibility of the supposedly exonerating evidence combined with the lack of credibility of the omitted witnesses, petitioner has failed to convince the Court that, had the testimony of Ramirez, Juan Ayon, Larios, and Alapizco been presented, there is a reasonable probability that the result of the trial would have been different. Consequently, the Court finds and concludes that petitioner has failed to make the requisite showing of prejudice with respect to this ineffective assistance claim.

2. trial counsel's alleged failure to object to evidence of other crimes

Petitioner contends that he received ineffective assistance of counsel when his trial counsel "never moved to exclude or limit the force of other crimes evidence" recovered during an unrelated search of petitioner's residence that was conducted in 1993, and failed to object when documents from this search were admitted without foundation. (Pet. ¶ 10(b), Add. ¶ 10b)). In addition, petitioner contends that his trial counsel should have moved to exclude the evidence obtained pursuant to the search conducted in 1993 because the search warrant was issued without probable cause, and should have requested a jury instruction limiting the consideration of the evidence once it had been introduced. (See Pet. Add. ¶ 10(b), Trav. at 19-27; Supp.

Trav. at 3-8).

*a. the alleged failure to move to exclude the evidence of other crimes.*

The record belies this portion of petitioner's claim. First, petitioner's trial counsel did file opposition to the prosecution's pre-trial motion to introduce material recovered during the 1993 search as evidence of other crimes pursuant to California Evidence Code § 1101(b). (See CT of 2/18/99 at 21-29, 34-47). In his opposition, trial counsel argued that the material seized in the 1993 search was not relevant to prove knowledge, motive, intent, or a common plan because petitioner was never charged with any crime based on that evidence; and that the 1993 search was too remote to be relevant to the charged crimes. (Id. at 38-45). The trial court issued a tentative ruling that the material was admissible. (See 8 RT 1856-57). During trial, petitioner's counsel objected prior to commencement of the testimony of the witness who was to introduce the seized material, arguing that the testimony was outside the scope of the lawsuit. The trial court ruled that the seized evidence was admissible. (See 9 RT 1856-61). Further, trial counsel objected: (1) to the lack of foundation for the introduction of documents recovered during the search; (2) to the admissibility of petitioner's income tax records; (3) that the witness was not qualified to testify regarding the income level required to purchase various properties; and

(4) that the documents failed to show that petitioner was involved in narcotics dealing. (See 9 RT 1890-93, 1898). Additionally, after the evidence from the search had been admitted, trial counsel subjected the witness to extensive cross-examination regarding the lack of connection between petitioner and the documents seized during the earlier search. (See 9 RT 1899-1901). Thus, contrary to petitioner's contention, petitioner's trial counsel did raise repeated objections to the admission and relevancy of the evidence of other crimes.

b. *the failure to move to suppress the evidence of other crimes based on the alleged lack of probable cause for the search warrant* [16]

Petitioner contends that his trial counsel was ineffective for failing to move to suppress the evidence obtained pursuant to the 1993 search warrant on the

---

16

If the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not pursue habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure should have been excluded from trial. See Stone v. Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). However, the restriction on federal habeas relief does not apply to claims under the Sixth Amendment for ineffective assistance of trial counsel based on allegedly incompetent representation with respect to a Fourth Amendment claim. See Kimmelman, 477 U.S. at 382-83. In order to prevail on such a claim, petitioner must "prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." Id. at 374.

ground that; the warrant was issued without probable cause, because there was no evidence tying petitioner or his residence to illegal activity. (See Trav. at 22-27; Supp. Trav. at 3-8).

*i. the record below*

On October 24, 1993, a search warrant was issued by a magistrate of the Los Angeles County Superior Court for the search of three residences and two vehicles, including petitioner's house at 124 N. Pearl Street, Compton. (See Lodgment 5, Exh. 13 at 1-2; Supp. Ans., Exh. B at 92-93). The warrant incorporated the attached affidavit of Detective Ken Edwards, a police officer assigned to the Southeast Cities Against Narcotics enforcement team. (Supp. Ans., Exh. Bat 92, 95). In the 13-page affidavit, Detective Edwards detailed the suspected method of operation of a Mexican cocaine smuggling organization and the surveillance that was conducted on October 23-24, 1993, of two apartments in the City of South Gate. During the surveillance, two men were observed to leave the apartments and surreptitiously contact and meet with a man who was driving a van that was registered in petitioner's name at the 124 N. Pearl Street address. (Id. at 101-04). The three men then entered the van and drove to 124 N. Pearl Street. Later, a car driven by a man who exited one of the apartments under surveillance was stopped and searched, revealing cocaine, a gun, and $1000 cash. (Id. at 104-07).

At trial, Detective Edwards testified that, on October 29, 1993, he conducted a search of the house at 124 N. Pearl pursuant to the search warrant. (9 RT 1882). Detective Edwards found the following items during the search: (1) documents listing "pay and owes" (explained as lists noting kilos of cocaine sent out with the corresponding amount owed); (2) documents linking petitioner to seven different properties in Los Angles and Riverside Counties; (3) documents that appeared to be scores for some type of game listing several names including "Pancho"; (4) six money transfers to Sinaloa, Mexico, for a total of $800,00O, between October 6, 1993 and October 21, 1993, listing different names for the senders, including Roberto Ramirez and Maria Mendoza Ramirez; (5) utility bills and a letter regarding fire insurance for 1217 Mulberry Street in petitioner's name; (6) photographs of petitioner; (7) business cards for petitioner with various other individuals; (8) federal income tax records for petitioner; and (9) the records of four checking accounts and one savings account for petitioner and his wife containing over $100,000. (9 RT 1882-91, 1895-98). Detective Edwards testified that based on his experience, the pays and owes sheets indicated that hundreds of thousands of dollars were being brought into the organization and that petitioner was a "high level distributor of cocaine." (9 RT 1884, 1898).

ii. *Petitioner has failed to make the requisite showing of deficient performance.*

As discussed above, trial counsel unsuccessfully moved to exclude the evidence from the 1993 search as inadmissible evidence of other crimes. Petitioner argues that trial counsel was ineffective for not also moving to exclude the evidence based on the lack of probable cause for the search warrant. However, the Supreme Court clearly has held that exclusion is appropriate for evidence seized pursuant to a warrant only in cases where the warrant is based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable" or where the warrant is "so facially deficient... that the executing officers cannot reasonably presume it to be valid." United States v. Leon, 468 U.S. 897, 923, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) United States v. Chavez-Miranda, 306 F.3d 973, 980 n.3 (9th Cir. 2002), cert. denied, 537 U.S. 1217 (2003). The good faith exception will save evidence found in a search based on a defective warrant unless no reasonable police officer could have believed there was probable cause to search the location identified in the search warrant. See United States v. Tate, 795 F.2d 1487, 1491 (9th Cir. 1986).

Here, petitioner does not even purport to argue that the warrant was facially deficient or that the supporting affidavit was so lacking in indicia of probable cause to render the executing officers' belief in its existence entirely unreasonable. Further, "great deference" is

accorded to a magistrate's determination of probable cause. See Leon, 468 U.S. at 914; United States v. Hay, 231 F.3d 630,634 n.4 (9th Cir. 2000), cert. denied, 534 U.S. 858 (2001). As adduced by petitioner, the affidavit supporting the search warrant set forth specific and recent facts linking petitioner's car and house to the occupants of an apartment being used in connection with the transportation of cocaine, weapons, and cash. There was nothing on the face of the affidavit to render the executing officers' belief in its validity objectively unreasonable. See, e.g., United States v. Clark, 31 F.3d 831, 835 (9th Cir. 1994) (holding that the good faith exception applied because "there was enough information so that objectively reasonable officers were entitled to rely on the magistrate judge's determination," despite finding that an anonymous tip, which did not link defendant to criminal activity and was only partially corroborated, and an unsupported assertion that the target's electricity usage was "high," were inadequate to support a finding of probable cause). The Court therefore finds that petitioner has failed to show that there is a reasonable probability that, had trial counsel moved to suppress the evidence from the 1993 search based on lack of probable cause, such a motion would have been granted.[17] The failure to make a futile motion does not

[17] Respondent argues that, had trial counsel moved to suppress the evidence based on the invalidity of the 1993 search warrant, the motion would not have been granted since exclusion of the evidence would have had minimal deterrent effect because the charged crimes were not in the "zone of primary interest" of the officers executing the warrant. (Supp.

(continued...)

constitute ineffective assistance of counsel. See James v. Borg, 24 F.3d 20, 27 (9th Cir.), cert. denied, 513 U.S. 935 (1994); Morrison v. Estelle, 981 F.2d 425, 429 (9th Cir. 1992), cert. denied, 508 U.S. 920 (1993).

*iii. Petitioner also has failed to make the requisite showing of prejudice.*

The evidence from the 1993 search was important, but it was not essential to proving any of the prosecution's main arguments. In closing, the prosecutor argued that the testimony of Detective Edwards was important to show that petitioner had transferred money to Mexico and that the pay and owes records indicated that "they've done transactions clearly in the millions." Further, the prosecutor argued that the documents found in the 1993 search linked petitioner to the house at 1217

---

(...continued)
Ans. at 5-6). The Ninth Circuit has held that evidence seized in violation of the Fourth Amendment may be admissible in a later case if the later prosecution was outside the original officers' "zone of primary interest" when conducting the illegal search. See United States v. Medina, 181 F.3d 1078, 1080 (9th Cir. 1999), cert. denied, 529 U.S. 1056 (2000); United States v. Basinger, 60 F.3d 1400, 1407 (9th Cir. 1995); United States v. Lopez-Martinez, 725 F.2d 471, 476 (9th Cir. 1983); see also People v. Bauer, 77 Cal. App. 4th 1433, 1439, 92 Cal. Rptr. 2d 572 (Cal. Ct. App. 2000) (finding that evidence from a 1996 search was admissible in a 1997 arrest, because the "instant arrest was not within the zone of primary interest" of the police in 1996). Because the trial court also may have denied any motion to suppress on this basis, respondent's argument reinforces petitioner's failure to show that there is a reasonable probability that, had trial counsel moved to suppress the evidence from the 1993 search based on the inadequacy of the warrant, such a motion would have been granted.

Mulberry and to Ramirez as early as 1993. Finally, the prosecutor argued that the evidence shows that petitioner knew the co-conspirators and that they were "doing cocaine transactions back then. He's still doing it." (9 RT 2093-94, 2101; 10 RT 2165-66). However, the prosecution presented significant evidence establishing petitioner's extensive connections with co-conspirator Ramirez apart from the wire transfers in Ramirez' name found in the search. For example, Ramirez had been to Las Vegas with petitioner at least two times in 1995, the car petitioner was driving at the time of his arrest was registered to an address where Ramirez's girlfriend was living, petitioner had an old phone number for Ramirez, and he made numerous calls to Ramirez' cell phone. Apart from the utility bill and insurance records for the Mulberry Street property, other evidence linked petitioner to that address including a letter found at the house were petitioner was arrested, as well as evidence that petitioner previously had resided there and his girlfriend was residing there at the time of his arrest. Apart from the property and financial records found in the search, other evidence established that petitioner or his wife owned at least five houses despite the fact that his business made little money, and that petitioner had gambled large sums of money in Las Vegas. Finally, petitioner was connected with the name "Pancho" by his own admission to the police at the time of his arrest that he was called "Pancho."

Based on its independent review of the record, and

in light of the many pieces of evidence that created a strong and convincing case against petitioner, the Court is not convinced that, if the evidence found in the 1993 search been suppressed, there is a reasonable probability that petitioner would not have been convicted.

c. *the alleged failure to request a limiting instruction*

Petitioner additionally claims that his trial counsel was ineffective for failing to request jury instructions limiting the applicability of the evidence from the 1993 search once it had been introduced. However, the record belies this claim. The relevant jury instructions, CALJIC 2.50 and 2.52, were not given because petitioner's trial counsel strenuously objected to the proposed instructions, arguing that no evidence of other crimes had been admitted to make the instructions relevant or necessary. (See 10 RT 2145-48, 2182-90). Trial counsel stated that he believed that petitioner would suffer prejudice if the instructions were given because "there has been no evidence of my client being engaged in other, quote, crimes or illegal activity." (Id. at 2182-83, 2188). The trial court ruled that the instructions would not be given "based on what appears to be a clear informed waiver that [petitioner's counsel does not] wish to give it [sic] under any circumstances." (Id. at 2190). Thus, contrary to petitioner's contention, petitioner's trial counsel did not fail to request limiting instructions; rather, trial counsel made a deliberate tactical decision to oppose the giving of such instructions. Petitioner has

not overcome the strong presumption that trial counsel's decision was an objectively reasonable one under the circumstances of the case. See Lord, 184 F.3d at 1085.

3. trial counsel's failure to present an expert in voice comparisons

Petitioner contends that his trial counsel was ineffective for failing to present testimony from a defense expert in voice comparisons. (See Pet. ¶ 10(c), Add. ¶ 10(c); Trav. at 28-32). Petitioner argues that the failure of trial counsel to seek and present expert testimony to establish that his voice was not the voice of "Pancho" on the intercepted tapes was unreasonable because expert witnesses were readily available and such testimony was necessary to rebut the testimony of the prosecution's expert. (Trav. at 28-31).

At the Evidentiary Hearing herein, petitioner adduced the testimony of Dr. Peter Ladefoged ("Ladefoged") as an expert witness on voice identification, the testimony of Ladefoged's Spanish language assistant, and the opinion of his Strickland expert. In his Post-Hearing Brief, petitioner contends that trial counsel knew that obtaining an expert in voice comparisons was necessary and failed to do so. Although petitioner's family provided $5000 for the expert and trial counsel sent some tapes to an expert, he sent tapes of calls intercepted after petitioner was arrested rather than the voice exemplar and the tapes that would be used by the prosecution at trial, and he did not call the expert as

a witness. According to petitioner, trial counsel's failure to seek a comparison of the voice exemplar and failure to present expert testimony was below the standard of a reasonably competent attorney. (Petitioner's Brief at 12-16). Further, petitioner argues, there was "overwhelming objective evidence" that petitioner is not the "Pancho" on the intercepted tapes and Ladefoged said "without equivocation" that petitioner is not the "Pancho" on the tapes.[18] Petitioner maintains that, because trial counsel failed to introduce objective evidence that petitioner was not Pancho, there is a reasonable probability that the result of the trial would have been different. (Id. at 16-18).

*a. the record below*

Petitioner first claimed that his trial counsel was ineffective for failing to present a defense voice expert in his habeas petition to the California Superior Court. (See Lodgment 3 at 21-22, 38-40). Petitioner supported his claim with a declaration from Dr. Ladefoged, a declaration from a court-certified interpreter in Spanish and English, and the opinion of his Strickland expert that trial counsel was ineffective for failing to investigate and

---

[18] Petitioner argues strenuously that petitioner, petitioner's family, petitioner's trial counsel, and the co-conspirators all testified that petitioner's voice was not the voice of "Pancho" on the tapes, providing "powerful incontrovertible...proof" that the is not Pancho. (See Petitioner's Brief at 10-11, 13-14, 16,18). But the relevant question on federal habeas review of this ineffective assistance of counsel claim is not the **truth** of whether petitioner's voice is that of the "Pancho" on the intercepted calls. Rather, the relevant question is whether, but for trial counsel's failure to present the testimony of a defense voice expert, there is a reasonable probability that petitioner would not have been convicted.

present objective evidence comparing petitioner's voice to intercepted tapes. (See Lodgment 3, Exhs. 19- 21). After the Superior Court denied the habeas petition (Ans. Exh. F), petitioner raised the same claim in his habeas petition to the Court of Appeal. (See Lodgment 4 at 49-52, Exhs. 19-21). The Court of Appeal summarily denied the habeas petition. (See Ans., Exh. H). Finally, the California Supreme Court summarily denied petitioner's subsequent Petition for Review, which raised the same claim. [19](See Ans., Exh. I at I-156 to I-157; Exh. J).

*b. The failure of trial counsel to call a voice expert did arguably constitute deficient performance*

At the Evidentiary Hearing, petitioner adduced evidence that Romero had retained a voice expert, Norman Perle ("Perle"), in September, 1997, shortly before trial was scheduled to begin. Perle was sent several tapes to analyze, but it does not appear that he

---

[19] The Court rejects petitioner's contention that the California Supreme Court's postcard denial of his petition for review of the Court of Appeal's denial of the habeas petition did not constitute a decision on the merits. (See Petitioner's Brief at 18). A postcard denial of a petition for review by the California Supreme Court long has been interpreted by the Ninth Circuit as a decision on the merits. See Gantt v. Roe, 389 F.3d 908, 913 (9th Cir. 2004) ("We interpret the California Supreme Court's summary denial of review without citation of authority to be a decision on the merits."); Harris v. Superior Court, 500 F.2d 1124, 1127-29 (9th Cir. 1974) (en banc) (holding that there is "no reason to suppose that a postcard denial without opinion is indicative of anything but a decision on the merits of the petition").

was ever sent petitioner's voice exemplar. There is no record of any results from the voice expert, and Romero testified at his deposition that he could not recall if he received any results. (3 EHRT 375-80, 383-85; Romero Depo. at 24-29, 59-61, 66). Further, Romero could not recall if he sent the voice exemplar to the expert. (Romero Depo. at 59-61, 68, 86). Although Perle's name did appear on one list of potential witnesses he was not called as a witness. (3 EHRT 380-82) The prosecutor at petitioner's trial recalled that Romero was planning to call a voice expert, but when the expert concluded he could not determine whether the voice was petitioner's, Romero decided not to do so. (5 EHRT 571, 574).

First, based on inconsistencies between Romero's recollections and other evidence presented, including evidence from petitioner's family members that Romero failed to account for money that he was given for the use of the expert, and the credible denial by Steingard of statements that Romero attributed to him, the Court does not find Romero's explanation for not presenting a voice expert to be credible. But the lack of a credible explanation by trial counsel is not dispositive because the relevant inquiry is whether, objectively, trial counsel's actions fell outside the range of professionally competent assistance. Based on the evidence that Romero had in fact retained Perle, as well as the recollections of the prosecutor, it is clear that Romero had explored calling a voice expert. If the voice expert that Romero retained had provided an inconclusive opinion, then it would not

have been ineffective assistance for counsel not to continue to look for an expert who might be able to provide a helpful opinion. Further, if the voice expert retained by Romero had opined that he was unable to determine whether petitioner's voice matched that of "Pancho" on the intercepted calls, this opinion would have been consistent with Ladefoged's second opinion, as well as with the opinion of respondent's expert who opined that the tapes were of such poor quality that no reliable analysis could be conducted. It clearly would not have been objectively unreasonable for trial counsel to decide not to present an expert who opined, as did Ladefoged, based on the voice exemplar available at the time of trial, that it was not possible to reach a conclusion regarding the voice of "Pancho" on the intercepted tapes. Nevertheless, based on the lack of any evidence that Romero even sought a comparison between the existing voice exemplar (or another voice exemplar) and the intercepted tapes that were used at trial, it appears to the Court that Romero failed to seek expert testimony that would likely have contradicted the testimony of Professor Pena, the prosecution's expert. Although there is evidence that Romero was pursuing a reasonable strategy to present evidence that conversations with Alapizco that were intercepted after petitioner was arrested contained the voice of the same "Pancho" who the prosecution claimed was petitioner (even petitioner's Strickland expert testified that this was a potential defense (5 EHRT 641)), the Court finds that it at least arguably was objectively unreasonable for

Romero not to also seek an expert to compare the existing voice exemplar (or another voice exemplar) to the intercepted conversations.

c. *Petitioner has failed to make the requisite showing of prejudice.*

Contrary to petitioner's characterization, Ladefoged did not opine "without equivocation" that petitioner is not "Pancho." (Petitioner's Brief at 16). Ladefoged provided at least three opinions in this matter; none were unequivocal.

In his first opinion, expressed in the declaration that was submitted to the state courts and with the Petition herein, Ladefoged opined that "the voice of [petitioner] on the May 30, 1996, voice exemplar tape was very probably not the same voice who was identified as Pancho on the calls with Alapizco." (Lodgment 3, Exh. 20 at ¶ 5). This opinion was based on Ladefoged's listening to the exemplar and the intercepted tapes "several times," for about one hour, and comparing various words as well as "the voice patterns, [and] use of words." (Id. at ¶¶ 4-5). Although not stated in his Declaration, Ladefoged does not speak or understand Spanish and has never before offered expert testimony in a case involving voices that were speaking Spanish. (2 EHRT 195-96). Because the conversations on the intercepted tapes are in Spanish, the Court questions the competency of Ladefoged to compare words and the use of words in a language he does not understand.

Moreover, Ladefoged disavowed his first opinion during his testimony at the Evidentiary Hearing. In his second opinion, Ladefoged testified that, after conducting additional comparisons, he was not prepared to render the opinion that he previously had rendered in his declaration, and he was not prepared to say "very probably it's not [petitioner's] voice." He opined that "probably" is an "overstatement" and that he can "render only the weakest possible professional opinion."[20](Id. at 214, 231). He agreed that he could not say that the voice on the exemplar was necessarily that of a different person than the person speaking in the intercepted conversations. (Id. at 232). More significantly, Ladefoged agreed that the exemplar was not sufficient to render an opinion about whether the voice on the wiretaps was or was not petitioner's voice. (Id. at 196-97, 239). Ladefoged expressed the opinion that the original recording of the exemplar would not have been much better because the higher frequencies in the recording were missing and that was unlikely to have resulted from recopying of the tapes. (Id. at 197)

---

[20] However, in what might be yet another opinion, in a report dated February 28, 2004 (and marked as an exhibit at the Evidentiary Hearing by respondent), Dr. Ladefoged opined based on his analysis after "extensive listening" to the tapes and measuring the pitch and vocal qualities of the voices, that "no unbiased observer could ever reasonably assert that [petitioner's] voice is on any of these tapes." (See EH, Exh. 102). Despite the apparent inconsistency, at the Evidentiary Hearing, Dr. Ladefoged confirmed that the opinion expressed in Exhibit 102 was still his opinion at the time of the hearing. (2 EHRT 229).

In conducting the additional analysis, Ladefoged analyzed only about five syllables or parts of words that he found to be comparable between the exemplar and the intercepted conversations. (Id. at 221-27). His Spanish-language assistant, Heriberto Avelino, testified that it was "fairly difficult" even for "a native speaker" to locate comparable words because the tapes were very noisy and the speakers were talking fast. (2A EHRT 28-33). If the same word was repeated multiple times in one conversation, Ladefoged did not know which of the occurrences of the word he had examined. (2 EHRT at 220-23). Further, Ladefoged did not conduct an inter-comparison of examples of the same word spoken multiple times by the same speaker, despite his acknowledgment that, if the same person said a word multiple times, each example would have a slightly different frequency. (Id. at 203-07). Ladefoged concluded that petitioner has "a significantly lower fundamental frequency," has a habit of dropping into what is called a "creeky voice," and has a "low raspy voice" that did not occur in any of the intercepted conversations. (Id. at 216-18). But Ladefoged admitted that, in order "to make a good quality comparison" he requires "a lot of syllables," and that his sample was "very small." (2 EHRT 212-13; 2A EHRT 15-16).

In addition, Ladefoged acknowledged that he did not know whether petitioner attempted to disguise his voice in making the exemplar. (2A EHRT 13). And he

agreed that each person has the capability of speaking with different voices that would distort the frequencies of that person's voice. Consequently, in his comparison, Ladefoged assumed that neither "Pancho" nor petitioner were "'putting on a disguise." (2 EHRT at 208-09). Ladefoged confirmed that, if there was some reason to believe that the voice on the exemplar had been disguised, "no listener would be able to say it's the same." (Id. at 209, 234).

During cross-examination, Ladefoged admitted that the frequency of a tape could change if it were played on different machines and that the frequency would be inaccurate in subsequent recordings if the tape had been recorded from a machine playing at an inaccurate frequency. Any variations in the playback speed would translate into variation of the frequency of the voice. Consequently, he acknowledged, it was impossible to know whether the tape speed errors on a multiple-generation recording of unknown origin accounted for any portion of the differences in frequency that he measured during his analysis. (2 EHRT 249, 2A EHRT 4- 7).

In his third opinion,[21] Ladefoged explained that he

---

[21] Respondent has objected to the introduction of this third opinion by Ladefoged based on a new voice exemplar that Ladefoged made during the Evidentiary Hearing. Respondent argues that the new evidence places

(continued...)

had prepared a new digital voice exemplar of petitioner's voice repeating phrases from tape Exhibit 15-A and compared the new exemplar to that one intercepted conversation. Despite having been present when the new exemplar was produced, Ladefoged noted that petitioner repeated phrases "somewhat hesitantly" and was not speaking "as loudly as he might." (4 EHRT 443-49). Ladefoged concluded that, based on the new exemplar, "it was very unlikely to be [petitioner's] voice" on the intercepted tape, and that he did not "think there is any scientific evidence that it is his voice at all." (Id. at 448). However, Ladefoged admitted that he had made no attempt to cross-compare the new exemplar to the old

---

(...continued)
the case in a significantly different light than that presented to the state courts and, consequently, renders this claim unexhausted. (Respondent's Brief at 14-15). The Court finds that the substance of petitioner's claim that a defense voice expert should have been called as a witness to testify that it was not petitioner's voice on the intercepted tapes was fairly presented to the California courts and, consequently, the introduction of the new voice exemplar does not render the claim unexhausted. Because the new evidence does not alter the gravamen of petitioner's claim, the Court is not precluded from considering it. See Luna, 306 F.3d at 965; Brown v. Myers, 137 F.3d 1154, 1157n.3 (9th Cir. 1998). In any event, even if the new evidence does render the claim unexhausted, the Court has discretion to deny an unexhausted claim on the merits. See 28 U.S.C § 2254(b )(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); Padilla v. Terhune, 309 F.3d 614, 621 (9th Cir. 2002) (noting that the exhaustion question need not be addressed because the district court is authorized to deny unexhausted claims on the merits).

exemplar. Nor did he look for the "creeky voice" that he had noted as a distinguishing feature of petitioner's voice in the old exemplar. Ladefoged agreed that, if the copy of the tape that he was using had been copied at a different speed than that of the original recording, the frequencies of the voices would have been altered, and that changes in the speed and pitch of the recording would affect his analysis. (Id. at 455-57, 464,466-67). In addition, Ladefoged had no idea to what extent petitioner's voice may have changed during the eight years between the intercepted conversations and when the new exemplar was made. (Id. at 465-66).

Respondent's voice expert, Richard J. McIlvery (McIlvery"), offered the opinion that analog recording devices were "speed sensitive: if the tape travels at a higher speed during playback than during recording, it will sound higher in pitch." (Decl. of McIlvery at ¶¶ 10-18). Moreover, every time an analog recording was re-recorded, it was subject to a degradation in fidelity. McIlvery further opined that, while digital audio recordings did not suffer from the same problems with transport speed and the resulting frequency errors as did cassette recorders, any comparison between a recording made on a cassette recorder and a digital recording "must take into account the instability of the cassettes." (Id. at ¶¶ 20-21). After listening to the analog voice exemplar and the intercepted tapes, McIlvery opined that the recordings "are all of very low quality." In particular" tape Exhibit 15-A clearly demonstrated speed instability

because the pitch of the telephone recorded at the start of the tape could be heard to change. Due to the instability of the recordings of the intercepted conversations, he did not believe that the tapes were a reliable basis for measuring frequencies with any degree of accuracy. (Id. at ¶¶ 22-23).

The Court finds that, while Ladefoged's third opinion was his strongest, his third opinion is not probative because it was based on a comparison of a digital recording with a poor-quality, repeatedly-copied cassette recording without making any attempt to correct for the recording errors in the analog recording. As established by the uncontroverted opinion of respondent's expert, given the instability displayed by the present generation of copies of the intercepted conversations, they cannot form a reliable basis for conducting an uncorrected analysis. Further, because Ladefoged disavowed his first opinion and concluded in his second opinion that the exemplar available to trial counsel was not sufficient to render an opinion about whether the voice on the wiretaps was or was not petitioner's voice (2 EHRT 196-97, 239), petitioner has failed to convince the Court that an expert could have rendered a valid comparison that would have been exculpatory.

Moreover, even taking the opinions of Ladefoged in their best light, the most that such testimony could have provided, if introduced at trial, was a second expert opinion for the jury to balance against the opinion of the

prosecution's voice expert. At best, Ladefoged only concluded that "it was very unlikely" that petitioner's voice matched that of "Pancho" in the intercepted conversations. (4 EHRT 448). Further, the testimony of Ladefoged would have been based on a questionable technical analysis of the measured frequencies of a few words; thus, it would not have constituted irrefutable evidence that the opinion of the prosecution's Spanish language expert, which was based on an audio identification of similar voice signatures, such as pitch level, tone, and phraseology, was incorrect. The prosecution's voice expert testified at trial that, after listening to the intercepted tapes and the voice exemplar many times, the voice on the voice exemplar appeared to be "very similar, if not the same voice" as that of "Pancho." (4 RT 871-72, 889-93, 904-06). Consequently, even if petitioner had introduced the testimony of a defense voice expert, a reasonable juror still could have concluded that petitioner was the "Pancho" on the intercepted tapes.

Finally, contrary to petitioner's contention that the "prosecutor leaned heavily on the intercepted tapes to show petitioner was the main co-conspirator"(Petitioner's Brief at 17), the record reflects that the prosecutor did not emphasize the testimony of his voice expert. At the Evidentiary Hearing, the prosecutor testified that the intercepted telephone conversations were "important, but they weren't as important as the rest of the evidence." (4 EHRT 531). This opinion is supported by the closing

arguments the prosecutor made at petitioner's trial. In his closing, the prosecutor merely stated briefly that the individuals listening to the intercepted calls testified that they did not hear the voice of "Pancho" on conversations with Alapizco taped after petitioner's arrest and that Dr. Pena had concluded that petitioner's voice exemplar was the same voice as that of "Pancho" (10 RT 2069-70, 2157). As the prosecutor argued, "we did not just need his "voice to link him to the cell phone. There [were] other ways." (10 RT 2081). The prosecutor did cover the factual details of the intercepted telephone calls in his closing (10 RT 2059-63), but he focused on the many links between the telephone number called by Alapizco and petitioner, rather than arguing that the voice on the tapes matched that of petitioner (10 RT 2063-67, 2085-89). Thus, the voice identification testimony was a fairly small part of the puzzle presented by the prosecutor to the jury. Although testimony from a defense voice expert may have bolstered petitioner's case with respect to the taped conversations, such testimony would not have countered any of the other pieces of evidence marshaled against petitioner. Under Strickland, the relevant test is not whether it is possible that the omitted testimony of a defense voice expert would have created a reasonable doubt as to petitioner's guilt, but rather whether there is a reasonable probability that petitioner would not have been convicted but for this trial counsel's failure to present such evidence. Here, petitioner has failed to convince the Court that, but for his trial counsel's failure to present the testimony of a voice expert comparing the

existing exemplar (or another exemplar) to copies of the intercepted tapes, there is a reasonable probability that the result of the trial would have been different.

**RECOMMENDATION**

**IT THEREFORE IS RECOMMENDED** that the District Court issue an Order:

(1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: April 11, 2005

/S/ ROBERT N. BLOCK
ROBERT N. BLOCK
UNITED STATES
MAGISTRATE JUDGE

## Appendix A

## SUMMARY OF THE FEDERAL COURT EVIDENCE

### A. Petitioner's evidence

A paralegal assistant with petitioner's counsel testified that she had prepared copies of tapes of the four intercepted telephone calls from November 3, 1995. The copies of the tapes were marked as exhibits 15-A through 18-A. The paralegal, who is fluent in Spanish, also listened to the tapes and verified that the transcripts were accurate. The transcripts of the content of the tapes were marked as Exhibits 15 through 18. Exhibit 19-A is a copy that she made of the voice exemplar of petitioner's voice. She listened to the tape and verified that the transcript was correct except for one change that she indicated on Exhibit 19. The paralegal prepared the copies used at the Evidentiary Hearing and by Dr. Ladefoged by recording from one tape recorder to another. (1 Evidentiary hearing Reporter's Transcript ("EHRT") 12, 14-20, 25).

Roberto Ramirez ("Ramirez"), one of petitioner's co-conspirators, testified that he was currently serving a 24-year sentence after having pleaded guilty to conspiring to sell cocaine. (1 EHRT 33, 40). Ramirez knew petitioner, but has not spoken to petitioner "[f]rom the time we got caught." (Id. at 30). Ramirz was arrested while driving the car after he had picked up cocaine from

the house at 2639 E. Jackson. Ramirez testified that, on the day of his arrest, he had driven the car into the driveway at 2641 E. Jackson, followed a path behind the house at 2641, and gone through the fence to the house next door. H retrieved 50 kilos of cocaine, put it into the car, drove away, and was arrested. That day, Ramirez did not enter the house at 2641 and did not see petitioner. Ramirez knew that Efrain Mendoza Larios ("Larios" took care of the house at 2641. (Id. at 30-32, 56-58). Ramirez testified that he had used the driveway at 2641 to load drugs maybe 6 to 8 times. (Id. at 59). If there was something wrong, he would be warned by Larios. On the day of his arrest, he had not been warned of any problems. (Id. at 61). He knew that a cell phone that was found by the police at the house at 2641 E. Jackson was used by many people, including Ramirez. There was a pool table at 2641 where Ramirez used to "hang out" and play pool. Ramirez had played pool with petitioner at 2641, but could not recall how many times. He knew that petitioner would come to the house to visit his girlfriend and his daughter, who was the baby of the girlfriend. (Id. at 62-63, 65).

Ramirez had known petitioner for several years at the time of his arrest. He did not know petitioner by the name of "Pancho." He is familiar with petitioner's voice from their conversations. Ramirez knew that petitioner had a business that used two trucks and Ramirez had sometimes worked for petitioner driving one of the trucks. He also had gone to Las Vegas with petitioner,

but he could not recall how often. (Id. at 32-33, 41). After listening to the tape of the voice exemplar, Ramirez testified that he recognized the voice as the normal voice of petitioner. Ramirez also listened to tapes 15-A to 18-A and offered his opinion that the voice of the person identifying himself as "Pancho" on the tapes was not the voice of petitioner. (Id. at 36-38).

He had never been interviewed by anyone in behalf of petitioner, but he would have been willing to testify at petitioner's trial. (Id. at 34, 38-39). During cross-examination, Ramirez confirmed that he would have been willing to testify despite the fact that his appeal process was pending at the time and he hoped to win a new trial. (Id. at 40-41, 56).

Ramirez testified that he believed that he had met petitioner at a bar in Compton but did not remember the name of the bar. In addition to driving the truck for petitioner for about one year, Ramirez also had worked doing lawns. He could not recall the name of petitioner's business, but recalled carrying barrels of oil, canned goods, and shoes. (Id. at 42-43).

Ramirez had known Larios for about 8-10 months at the time of their arrest. He and Ramirez both carried drugs for a man. Initially, Ramirez testified that he could not say the name of the man for whom he had worked because he "would get into trouble." He did know a business associate named "Pancho," but he called that

man "compa." Ramirez testified that the last name of the man called "Pancho" was "Aviles." He had spoken to the man he knew as "Pancho" many times and had spoken with him on the phone 30 to 40 times. He had worked for "Pancho" transporting drugs for about ten months. He recalled transporting drugs about 20 times, maybe more. (Id. at 44-48). Ramirez denied transporting cocaine at the request of petitioner and denied ever working for petitioner in any capacity other than transporting goods for his business. (Id. at 49). Ramirez testified that he was afraid to tell "Pancho's" true name because "that's a big guy." (Id. at 49). He testified that, when he was interviewed by petitioner's attorney in jail and petitioner's attorney played the tapes of the intercepted conversations, he told petitioner's attorney that the voice on the tapes was the voice of the person he had worked for. (Id. at 51-52). But Ramirez also testified that his trial counsel knew about "Pancho" at the time of Ramirez' trial and his trial counsel told him "it would be good for [him] to talk about..this person's full name." He was afraid at the time of his trial to reveal the identity of "Pancho." (Id. at 53-55). If he had testified at trial, he would only have revealed "Pancho's" name as "Aviles." (Id. at 65-66).

Juan Chavez Ayon ("Juan Ayon") testified that petitioner "is my brother," but then clarified his statement by stating that they had the same father, but different mothers. (Id. at 71, 96). Juan Ayon testified that he was currently serving time after having pleaded guilty

to possession of cocaine. (Id. at 71, 84). He was arrested on November 5, 1995, at a house where there was a large amount of cocaine and currency. He had arrived in the United States from Mexico about two weeks prior to his arrest. (Id. at 71-72). Petitioner's counsel showed Juan Ayon a declaration that indicated that it had been signed by Juan Ayon in 1998, but Juan Ayon testified that he did not recall signing the declaration, did not recall if he had read the declaration before he signed it, and did not recall if the document had been translated for him. (Id. at 72-74).[22]

Juan Ayon had known petitioner since they were children, but petitioner had left to come to the United States when he was about 14 or 15. He had not spent much time with petitioner as an adult because Juan Ayon lived in Mexico and petitioner lived in the United States. He once visited a sister in Compton and saw petitioner that week. He had also talked with petitioner on the telephone a few times and petitioner had visited his family in Mexico twice. (Id. at 74-78). Petitioner's attorney played the voice exemplar for Juan Ayon and he testified that he did not hear petitioner's voice on the tape. (Id. at 80). He called his brother "Francisco." (Id. at 80-81).

---

[22] Because Juan Ayon did not testify that he had signed the declaration and disputed some of the contents set forth therein, the declaration was not admitted was not admitted as an exhibit. (1 EHRT 108).

Juan Ayon testified that he never saw petitioner involved with any narcotics activity and that petitioner was not involved with Juan Ayon's presence at the house where he was arrested. Juan Ayon had made arrangements with men called "El Negro" and "El Chino" to stay at the house. They were going to pay him, but he got arrested before he was paid. (Id. at 81-82). He was coming to the United States to look for work "in the fields" and he met "El Negro" and "El Chino" in Tijuana. The men, whom he had never met before, brought him to the United States to take care of the house at 2639 E. Jackson. (Id. at 89-94).

He was never interviewed by anyone on petitioner's behalf at the time of petitioner's trial. (Id. at 82-83)

On cross-examination, Juan Ayon testified that he knew Ramirez, but had only seen him twice before they were arrested, once they went to Las Vegas, and once at a restaurant. He also knew Larios, but only since their arrest. He was incarcerated in the same yard of the prison at Tehachapi with Larios for about two months, but they never spoke about petitioner or petitioner's case. Juan Ayon also denied speaking to Larios about the case while the two of them were driven together in a car from Tehachapi to testify herein. (Id. at 84-88).

He knew that cocaine had arrived three days before his arrest and had been brought over the fence

from the house next door. He did not see his brother the day he was arrested and had never seen him at the house next door. (Id. at 89-94). Juan Ayon only found after his arrest that his brother was in the house next door. (Id. at 94). He had never attended parties next door, nor played pool there. Prior to his arrest, he did not know who was living at the house next door. (Id. at 102-103).

Juan Ayon had traveled to Las Vegas with his brother, Ramirez, and a woman. He could not recall when the trip had occurred and thought maybe it was during a different trip to the United States, but then he testified that he had gone with petitioner to Las Vegas in the two weeks prior to his arrest. (Id. at 99-100).

Larios testified that he is currently serving time at the Tehachapi prison. He testified that he pleaded guilty, but denied having admitted that he was involved with the activity going on next door. (Id. at 109, 113). He testified that it was his signature on his declaration. (1 RT 111).

Larios met petitioner "through a girl" at the house 2641 E. Jackson. He knew petitioner as "Mr. Francisco." He testified that he "just lived" at the house at 2641 E. Jackson; there was no purpose. He denied that he was a lookout for the activities at the house next door and denied knowing that there was any illegal activity going on at that house. (Id. at 112-13). He had been living there about six months to a year before his arrest. (Id. at 125). He was present when petitioner arrived at 2641 on

November 5, 1995. Petitioner had come to visit the "girl" who was living at the house with Larios. The "girl" and petitioner had a child who also lived at the house. Petitioner had been to the house "perhaps twice" to visit. Larios had spoken with petitioner during those visits, but not for long. (Id. at 114-115). Larios admitted that, on the day of his arrest, he had told the police that petitioner was coming over to visit his girlfriend, that he was going to take the child to the hospital, and that petitioner was going to take Larios out to lunch. (Id. at 116). The cell phone found by the police at 2641 E. Jackson was at the house before petitioner's arrival, but no one had used it the day of his arrest. (Id. at 123-24). Further, Larios testified that he believed that the phone had been there for about two weeks, but he had never seen anyone using the phone and did not believe that it had never rung. He testified there was no charger for the phone. (Id. at 134-36).

Petitioner's attorney played the voice exemplar twice for Larios and he stated that he recognized petitioner's voice on the tape. After listening to tapes 15-A to 18-A, Larios testified that he did not recognize the voice of "Pancho," but it was not petitioner's voice. (Id. at 118-23). He also testified that he was not interviewed by petitoner's trial counsel and that he would have been willing to testify on petitioner's behalf. (Id. at 123).

Larios denied that he had spoken to Juan Ayon while being transported from prison to testify. (Id. at

110). He further denied having seen Juan Ayon at Tehachapi at any time. (Id. at 124).

During cross examination, Larios admitted that he had lived at 1217 Mulberry in Compton with his sister when he first arrived from Mexico in 1995. He testified that he was renting the house on Jackson, but could not recall who the landlord was, whether he had ever met the landlord, or how much he paid in rent. He had never signed a lease for the house and had no verbal agreement with anyone. Larios testified that petitioner would give the "girl" who lived in the house money to help out, but she did not help pay the rent, nor did she work. (Id. at 125-29). On the day of his arrest, the "girl" was living there, but she had left earlier that day. He could not remember how he had met her and did not remember when she had arrived at the house. Larios admitted that he did not have a job, but said he paid the utilities at the house and denied that petitioner gave him any money for utilities. (Id. At 129-32).

Larios testified that he never used the driveway of the house at 2641 E. Jackson and had never seen or heard anyone in the driveway. He had never been to the house at 2639 E. Jackson. He never had any parties at 2641 and never had anyone over to play pool. He only met Ramirez when they were arrested. (Id. at 136-38).

Rosa Chavez Garcia ("Rosa"), petitioner's wife, testified that her husband spoke very little English.

Petitioner's trial counsel, Romero, spoke Spanish and she did not have ant trouble communicating with him in Spanish. (2 EHRT 145-50). During Romero's representation of her husband, she went to Romero's office numerous times, sometimes two to three times a week, to talk to him about the case. (Id. at 150-51). She recalled discussing with Romero that the prosecution claimed that petitioner was the person identified on the intercepted telephone conversations as "Pancho." Romero played some tapes for her and she did not recognize her husband's voice. Rosa did recognize her husband's voice when petitioner's counsel played the tape of the voice exemplar, and she testified that it was petitioner's normal voice. (Id. at 152-56). She testified that Romero never played the voice exemplar for her, never told her that he thought petitioner was doing anything with his voice, and never expressed any dissatisfaction with the voice exemplar. Petitioner's counsel then played tapes 15-A through 18-A and Rosa testified that she did not hear her husband's voice on the tapes. Further, Rosa testified that Romero had not played any of those tapes for her. (Id. at 156-62)

Romero told Rosa that he was going to hire a voice expert to testify that the voice on the tapes was not her husband's voice. At Romero's request, she gave him $5000 for the voice expert. Romero came to her house about a week before the trial to pick up the money. In addition, prior to trial, petitioner asked Rosa to tell Romero that he was not the "Pancho" on the tapes. (Id.

at 163-65, 167-68). Rosa repeatedly asked Romero what happened with the voice expert, but he always said he would presents the results at trial. (Id. at 169-70). Rosa also asked Romero to interview the other men arrested with petitioner and passed on requests from petitioner to have Romero interview the other men. (Id. at 170-72).

During cross examination, Rosa testified that, at the time of her husband's arrest, they were living at 124 North Pearl Street in Compton. She denied ever having lived at 2641 E. Jackson Street, but she admitted that she had been the victim of a home invasion robbery at that address. (Id. at 175-76).

Prior to being represented by Romero, her husband had been represented by three or four other attorneys. Prior to Romero, a Mr. Steingard had represented her husband for about a year. (Id. at 176-77).

Myra Chavez ("Myra"), petitioner's daughter, testified that she was fluent in both English and Spanish, but neither of her parents spoke more than a little English. (3 EHRT 348-50). She listened to the voice exemplar and testified that she recognized her father's voice and that his voice was no different than his normal speaking voice. (Id. at 353). Myra testified that she met with Romero on many occasions, sometimes two to three times a week, to discuss her father's case. Romero did play some tapes for her, but she had not heard 15-A through 18-A before petitioner's counsel played them at

the Evidentiary Hearing. She testified that she did not recognize her father's voice on the tapes. (Id. at 354-60, 363). Myra testified that Romero told her he wanted to hire a voice expert and that she was at home when Romero came to pick up $5000 from her mother to pay the expert. (Id. at 361-63). Myra asked Romero what happened with the voice expert, and he told her that he was still waiting for the results. (Id. at 368-69). Romero told her that he did not think she should be a witness at petitioner's trial because she was his daughter. (Id. at 370).

Myra testified that her father had never been called "Pancho," but that she knew that "Pancho" was common nickname for "Francisco." (Id. at 364-65).

Richard Steingard ("Steingard") testified that he had represented petitioner from shortly after his arrest in 1995 until he stepped off the case some time after November 1996, when Romero became co-counsel, due to Steingard's conflict with another trial. He recalled that John Yzurdiaga ("Yzurdiaga"), with whom he shared office space, represented Ramirez in the case. Steingard was aware that there were "individuals who were prepared to testify as exculpatory witnesses." (3 EHRT 258-62, 270-74). Before he left the case, Steingard shared his thoughts about the case with Romero. He recalled meeting with Romero to "educate him about the facts and circumstances of the case, bring him up to speed on what the case was about, what the potential

problems were, what the potential defenses were." Steingard recalled that, at that time, he was "aware that there were defendants that were prepared to testify...for the defense." but that it was too early to have made a decision as to whether they should be called as witnesses. He was certain that he would have discussed with Romero the availability of the other defendants. (Id. at 272-77). Steingard denied telling Romero that he was "staunchly opposed to calling the codefendants" as witnesses for petitioner. He also denied ever telling Romero that "there was no way [petitioner] could testify." Further, he did not recommend to Romero that Romero not interview the codefendants. Steingard clarified that, although the other defendants had pleaded guilty, they were all represented by counsel and, consequently, he would have discussed with their attorneys what their possible testimony would be. Steingard stated that he would have discussed with Romero the "perils of calling the codefendants and how a jury could react to a codefendant getting up and testifying on behalf of another defendant." (Id. at 281, 285-88). Steingard would not reject a potential witness merely because he was serving a significant sentence. But he would consider factors such as codefendant's prior convictions, his relationship to the defendant, such as whether there was a familial relationship and whether one was a leader and the other a follower, and whether other evidence could be used to prove what the codefendant's testimony would be. Ultimately, Steingard would evaluate whether he would advance his cause by

calling that person as a witness (Id. at 288-89). However, at the stage at which he left the case, they "were still in the process of gathering the type of information that, as [they] went into trial" would allow them to make the decision about calling the witnesses to testify. (Id. at 293). Similarly, it would have been premature to discuss whether petitioner would testify; that was a decision that would not be made until the prosecution had rested. (Id. at 283-84).

Steingard was present when the voice exemplar of petitioner's voice was made. Petitioner's counsel played the voice exemplar for Steingard who stated that, from what he could make out, it sounded like petitioner's voice. He also testified that he did not have the impression that petitioner was altering his voice in any way. (Id. at 293, 296-98). Steingard identified Exhibit 105 as copies of notes that he made regarding petitioner's case in March 1996. His notes indicate that he made a telephone call regarding various means to analyze the tape recordings. His notes also indicate that he played some tapes for petitioner, and Steingard recalled that petitioner always insisted that he was not "Pancho" on the tapes. (Id. at 300-04). Steingard's notes indicate that a voice analysis expert would cost $5000. (Id. at 306). Steingard recalled that he was planning to have an expert prepare another voice exemplar. (Id. at 317). In looking at Exhibit 109, Steingard recalled that he had listed various things that he might consider doing during the course of the case. One of the notes read, "Do

we want Roberto o Efrain?" Steingard clarified that the notation referred to the fact that Ramirez and Larios were two potential witnesses and that he would have to weigh the pros and cons of calling either one as witness for the defense. Steingard testified that the notation indicated to him that he was aware "that these two gentlemen were prepared to provide exculpatory testimony" and that he still needed to consider the merits of their potential testimony. (Id. at 307-09). Steingard recalled that the police reports contained damaging information as to both potential witnesses. (Id. at 313-14). Steingard also recalled that Ramirez's attorney had made it clear that Ramirez wanted t testify on petitioner's behalf. (Id. at 320-21).

Yzurdiaga testified that he had acted as counsel for Ramirez while he was petitioner's co-defendant and, in addition, he shared a suite of offices with Steingard, petitioner's first counsel. Ramirez told Yzurdiaga that he would be willing to testify on petitioner's behalf that petitioner was not involved in the possession and distribution of the drugs that were seized. Yzurdiaga passed this information on to Steingard. Yzurdiaga recalled that Ramirez pleaded guilty in March of 1996 and that Ramirez offered to testify for petitioner after Ramirez had been sentenced. Yzurdiaga confirmed that Ramirez did appeal the ruling on a motion to suppress despite the guilty plea. Although Yzurdiaga explained to Ramirez that his testimony on behalf of petitioner might prejudice Ramirez if he were to win on appeal, Ramirez

was determined to testify for petitioner and was not concerned about any risk to himself. Yzurdiaga recalled that he and Ramirez never discussed the possibility of Ramirez requesting a grant of judicial immunity. (4 EHRT 424-32).

Dr. Peter Ladefoged ("Ladefoged"), a professor emeritus in the Linguistics Department at the University of California Los Angeles ("UCLA"), testified as an expert witness on the process of comparing a tape of a voice of an unknown person to that of a known person. His method is to identify words or phrases on the two tapes that are the same, listen to the words extensively, and locate small pieces in the paired words that can be compared though acoustical analysis. He uses a computer to facilitate listening to the recordings and looks at basic characteristics of the sounds such as fundamental frequency. He studies the "individual components of the sound that add together to make the different vowel and constant qualities." (2 EHRT 185-86, 187-190).

Ladefoged admitted that none of the cases that he has performed voice comparisons for involved people speaking Spanish and that he had never qualified as an expert in comparing voices speaking Spanish. He does not speak Spanish and, therefore, he asked a former student to assist by listening to the tapes and helping him to pick out particular words. However, when Ladefoged prepared his 2002 declaration (see Lodgment 3 and 5, Exh. 20), he only used a Spanish-language translator for

assistance. Further, Ladefoged stated that his initial opinion as expressed in his declaration was based on about one to two hours listening to the tapes. (Id. at 195-96, 198-200).

Ladefoged used a copy of the voice exemplar of petitioner's voice and compared it to the four intercepted conversations. Ladefoged characterized the quality of the voice exemplar as the "worst exemplar" that he has ever seen. He admitted that his work is "limited by the fact that the exemplar...it's not good." (Id. at 196-97, 203). Further, Ladefoged expressed the opinion that the original recording of the exemplar would not be much different because the higher frequencies were missing. Recopying of the tapes adds "white noise" but would not likely remove the higher frequencies. (Id. at 197). In comparing the tapes, Ladefoged located common sounds between the voice exemplar and the unknown voices in the intercepted conversations. However, Ladefoged did not conduct an intercomparison of examples of the same word spoken multiple times by petitioner on the exemplar. Ladefoged stated that he only studied instances where the same word was spoken by petitioner on the exemplar and by the unknown voice on the intercepted conversations. Ladefoged explained that, if the same word was present on the exemplar multiple times, each example would have a slightly different frequency because, each time a person says a word, it is said slightly differently. (Id. at 203-07). Additionally, Ladefoged explained that each person has the capability

of speaking with different voices that would distort the frequencies of that person's voice. Consequently, in his comparison, Ladefoged assumes that the unknown voice and the known voice are not "putting on a disguise." (Id. at 208-09). Ladefoged confirmed that, if there was some reason to believe that the voice on the exemplar had been disguised, "no listener would be able to say it's the same." (Id. at 209). Further, Ladefoged agreed that, if the exemplar is "not an accurate recording of [petitioner's] voice, nobody can say anything about it." (Id. at 234).

Exhibit 102 is a report dated February 28, 2004. Ladefoged concluded therein, based on his analysis of a few comparable syllables, that petitioner has "a significantly lower fundamental frequency," has a habit of dropping into what is called a "creeky voice," and has a "low raspy voice" that did not occur on any of the tapes of the intercepted conversations. (Id. at 216-18: EH Exh. 102). Ladefoged compared three words that were common to the known and unknown tape # 889 as well as some "little words" on tapes # 878, 890. (Id. at 219). Ladefoged indicated on the transcripts of the tapes the words that he compared, but could not say which of multiple occurrences of a word from the exemplar he had examined. (Id. at 220-23). Ladefoged admitted that his sample was "very small" and he could not make any statements about the consistency of the speaker's voice in uttering the same syllable multiple times. (2A EHRT 15-16).

Based on the additional comparisons that he had conducted, Ladefoged stated that he was not prepared to render the opinion that he previously had rendered in his declaration of 2000, and he was not prepared to say "very probably it's not [petitioner's] voice." He opined that "probably" is an "overstatement." (Id. at 231). He agreed that he could not say that the voice exemplar was necessarily that of a different person than the person speaking in the four intercepted conversations. (Id. at 232). Moreover, Ladefoged agreed that the exemplar was not sufficient to render an opinion about whether the voice on the wiretaps was or was not petitioner's voice. (Id. at 239). Ladefoged stated that he does not know whether petitioner attempted to disguise his voice in making the exemplar. (2A EHRT 13).

Ladefoged acknowledged that the frequency of a tape could change if it were played on different machines and that the frequency would be inaccurate in subsequent recordings if the tape had been recorded from a machine playing at an inaccurate frequency. Consequently, it is impossible to know whether tape speed errors on a recording that was a "multiple-generation tape," and recorded on a battery-powered tape recorder, account for any changes in frequency measured during analysis. (2A EHRT 4-7). Ladefoged testified that he did not know the type of machines that the intercepted recordings were recorded on and, therefore, did not know whether the frequencies he had measured were the product of tape speed errors in the dubbing or recording process. (Id. at

6-7). Moreover, Ladefoged admitted that the voices of some people remain stable over long periods of time, but the voices of other people vary over the space of a year. He had no information on petitioner's health, smoking habits, or use of intoxicants at the time either the intercepted tapes or the exemplar were made that might have affected the sound of the voices on the tapes. (Id. at 7-10).

Heriberto Avelino ("Avelino") testified that he was from Mexico and had learned English about six years earlier. He recently had obtained his doctorate in Linguistics from UCLA working with Ladefoged. Avelino assisted Ladefoged in the analysis for petitioner by listening to the tapes and identifying words or phrases that appeared in the exemplar and on the intercepted calls. Avelino testified that it was "fairly difficult" even for "a native speaker" to locate the words because the tapes were very noisy and the speakers were talking fast. He testified that when he selected words from the tapes, if a word was repeated, it might not have been analyzed multiple times if one version of the same word was "unstable for purposes of comparison," perhaps because it was too rapidly. (2A EHRT 28-33).

Ladefoged was recalled as a witness after he prepared a new voice exemplar of petitioner's voice using the digital recording capabilities of his computer and compared the new exemplar to the voice on tape 15-A. In preparing the exemplar, the court translator

repeated phrases spoken by the unknown male on tape 15-A and petitioner repeated the phrases into the computer. Ladefoged stated that petitioner repeated the phrases "somewhat hesitantly" and that he was not speaking "as loudly as he might." (4 EHRT 443-47). After further analysis, Ladefoged concluded that, based on his evidence, "it was very unlikely to be [petitioner's] voice" on the intercepted conversation. Further, Ladefoged opined that he did not "think there is any scientific evidence that it is his voice at all." (Id. at 448). He noted that some of the words on the new exemplar were " spoken very slowly and hesitantly" by petitioner and were not used in the analysis. (Id. at 448-49). Ladefoged made no attempt to cross-compare the new exemplar to the old exemplar because he considered the old exemplar to be such a bad tape. Nor did Ladefoged look for the "creeky voice" that he had noted as a distinguishing feature of petitioner's voice in the old exemplar. Ladefoged agreed that, if the copy of the tape 15-A that he was using had been copied at a different speed than that of the original recording, the frequencies of the voices would have been changed in a consistent manner. If the speed and pitch of the recording of tape 15-A had been increased, it would alter his analysis. Additionally, Ladefoged admitted that, if he had had more words to compare, his opinion would be more reliable. (Id. at 455-57, 464, 466-67).

Petitioner testified on his behalf and confirmed that the voice on the voice exemplar prepared for his trial

was his voice. He denied having attempted to disguise his voice. Petitioner also denied that it was his voice on tape 15-A and confirmed that his attorney, Romero, had played that tape for him while he was in county jail. Petitioner testified that Romero had only played that one tape for him. He told Romero that he was not "Pancho." Petitioner said that he never had been known by the name "Pancho." Petitioner also denied that it was his voice on tapes 16-A through 18-A. (4 EHRT 473-75, 481-82). Petitioner believed that Romero was going to hire a voice expert to prove that he was "not the 'Pancho" on the tape." Romero told him that it would cost around $5000 and petitioner asked his family to "get ahold" of the money. (Id. at 476). He did ask Romero about the results of the expert's analysis, and Romero told him that the expert was not needed because he was going to win. Petitioner testified that he told Romero that he would give another voice exemplar if asked. Petitioner denied ever refusing to give a new exemplar. (Id. at 478-80). Petitioner also testified that he had told Romero that he wished to testify, but Romero refused and said it was not necessary. (Id. at 480, 484). Petitioner discussed with Romero having Ramirez, Larios, and Juan Ayon testify and Romero said he would interview the men. Petitioner asked Romero to call the men as witnesses, but Romero consistently said it was not necessary because "the case was won." (Id. at 482-84).

During cross examination, petitioner testified that he was the victim of a home invasion robbery in April of

1994 at a home on Bradfield Avenue. During the incident, his wife was kidnaped and taken to an address on North Pearl. Petitioner's family was the victim of another home invasion robbery in December of 1994 at the home at 2641 E. Jackson, where petitioner's wife was staying with her sister for a few days. Petitioner denied ever having lived at the house. (Id. at 489-92, 496).

Petitioner testified that he had gone to the house on East Jackson to "drop off some pampers" for his baby and to go out to lunch with Larios. He testified that his baby and the baby's mother, Irlanda Soto, lived at 2641 E. Jackson. He denied knowing who lived at the house at 2639 E. Jackson. He also denied knowing that his brother, Juan Chavez Ayon, was at the house. Petitioner testified that he told the police that he did not know his brother because he did not know that Juan Ayon was at the other house. Petitioner also denied ever having been to the house at 2639 and denied knowing what was going on at that house. (Id. at 470-71, 493-96).

Finally, Roger Rosen ("Rosen") testified as an expert on the reasonableness of trial counsel's actions ("Strickland expert"). Rosen testified that he did not consider the failure to interview available codefendants up to the standard of competent counsel in a such serious case. In his experience, the fact that a potential witness was a convicted felon would not stop him from exploring the possibility of using that witness in the defense case. Therefore, it was his opinion that it was "incumbent

upon Romero to explore" what petitioner's co-defendants would have testified to. Before rejecting a potential witness, counsel should at least "have an idea what that witness is going to say." However, Rosen acknowledged that it is not always possible to have the benefit of interviewing a codefendant before deciding whether to call that person as a witness. (5 EHRT 611, 613-15, 617, 653-54). Additionally, a reasonable competent attorney should have asked an expert to compare the tapes of the intercepted conversations with the existing voice exemplar or a better voice exemplar. (Id. at 648, 668-69).

**B. Respondent's evidence**

Thomas Dove ("Dove") testified that he was an investigator with the Orange County Sheriff's Department. On May 30, 1996, he was assigned to the Orange County regional Narcotics Suppression Program and was asked to prepare a voice exemplar of petitioner's voice. Prior to preparing the voice exemplar, he was involved in the narcotics investigation that led to petitioner's arrest. Dove was present at the time of petitioner's arrest and was present while petitioner spoke with another officer in Spanish. Dove listened to the copy of the voice exemplar being used for the Evidentiary hearing and testified that, while he recognized the words that he had spoken when the voice exemplar was made, in listening to the tape now, he thought that it sounded very slowly and that his own voice sounded as if it had been slowed down. (3 EHRT 326-29). Dove testified that he would have made several

copies of the tape of the voice exemplar and that he believed that the original was either in the possession of the sheriff's department or had been destroyed. (Id. at 336-38). Dove recalled discussing with his investigator at the time the voice exemplar was made that it appeared as if petitioner was attempting to disguise his voice. He did not attempt to make another copy because he thought it would be useless to try again. (Id. at 343-44). It was his strong opinion that petitioner was attempting to disguise his voice by talking in a lisping manner and fluctuating his volume. (Id. at 346-47).

John Ramseyer ("Ramseyer"), a deputy district attorney, was the prosecutor in the case against Ramirez, in which petitioner was initially a defendant along with Juan Ayon, Jesus Lara, Jose Ontiveros, and Larios. Petitioner's case was dismissed by the trial court on the original complaint and a new complaint was subsequently filed. The other defendants in the original matter pleaded guilty during the testimony of the prosecution's last witness. (4 EHRT 507-09). Ramseyer also was the prosecutor when petitioner's case went to trial. Prior to petitioner's trial, Ramseyer had conversations with Romero about proposed witnesses and Romero indicated that he "may be calling one or more of the codefendants to testify" on behalf of petitioner. But, throughout trial, Romero indicated that "he wasn't sure if he was going to actually call them because of the way the testimony was coming out at trial." (Id. at 509-11).

Because Ramseyer had tried the case against petitioner's codefendants, he was very familiar with the evidence against them. With respect to Roberto Ramirez, he told the police that he did not know petitioner and petitioner denied knowing Ramirez. But when petitioner arrived at the house on E. Jackson the day of his arrest, he drove a car that was registered to a fictitious individual with an address where Ramirez's girlfriend resided. When police officers searched the address where the car was registered, they found paperwork indicating that Ramirez lived there; they also found plane tickets in the name of Ramirez, Juan yon and petitioner. Further, Ramseyer had evidence that petitioner had traveled to Las Vegas with Ramirez a number of times. (Id. at 511-12, 515-17). Moreover, Ramirez had testified during his own trial at a hearing regarding a motion to suppress the drugs found in his car, and he had testified that he did not know petitioner. Ramseyer would have impeached Ramirez by showing that he had lied and by showing that Ramirez had called back and forth to the cell phone found with petitioner the day of the drug shipment. (5 EHRT 591-92).

With respect to Larios, he had informed the police that petitioner had arrived at the house just a minute before the police officers had arrived, but the surveillance of the house proved that not to be true. The landlord who was renting the house where Larios said he had resided for three months did not know him and the utilities were listed in another name. Further, although

Larios denied knowing anyone at the house at 2639 E. Jackson, a utility bill for that house was found at 2641 E. Jackson. In addition, Larios had lived at times at an address on Mulberry Street where other defendants, including Ramirez, had lived at times. Although Larios had testified that the cell phone found at 2641 was there before petitioner arrived, records of the calls made to and from the phone indicated that the cell phone was not present at that location until after petitioner had arrived. (Id. at 517-20). Finally, although Larios denied having heard any vehicle in the driveway at 2641 E. Jackson, the driveway was visible from a window in the living room as well as a window in the kitchen. Moreover, there were windows in the house that looked directly onto the path between the two houses. (Id. at 521-27). And, with respect to Juan Ayon, he initially gave a false middle name to the police, and he denied knowing petitioner although records indicated that Juan Ayon had traveled to Las Vegas with petitioner a number of times. Juan Ayon had also used the address on Mulberry Street that was used by other codefendants. (Id. at 527-28).

Ramseyer had evidenced that petitioner was called "Pancho" based on a listing in the directory of the person who made the intercepted calls to Pancho, for a "Pancho" with the telephone number of 999-2958, which was the number for the cell phone that was found with petitioner at 2641 E. Jackson, and based on the knowledge of Dr. Pina, who testified that "Pancho" is a common nickname for Francisco. (Id. at 534-35; 5 EHRT

585-86). Further, at one point during the trial of the co-conspirators while petitioner was included with the group, Ramirez heard a person in the back of the courtroom audience call out the name "Pancho" and saw petitioner turn and look at the person. (Id. at 535, 538-39; 5 EHRT 594-96).

Ramseyer listened to petitioner's voice exemplar 20 to 30 times prior to trial. After listening to tape 19-A, Ramirez testified that he recognized the contents of what was being said on tape, but he did not recognize the voices. Tape 19-A did not sound like the voice exemplar that he had used for trial; it sounded like it had been slowed down. (Id. at 536, 540). Ramseyer recalled that petitioner's trial counsel, Romero, was planning to retain a voice expert. He believed that Romero told him just before trial that his expert was unable to say either way whether the voice on the intercepted tapes was that of petitioner, and that Romero was not going to call the expert. (5 EHRT 571, 574).

Jennifer Chang ("Chang") worked as a law clerk for Romero, petitioner's trial counsel, from the summer of 1997 through the spring of 1998. She worked on petitioner's case prior to and during petitioner's trial. She did not discuss any tactical decisions with Romero. Chang recalled that she contacted a man named Norman Perle ("Perle") about acting as a voice expert and that she had arranged for a number of tapes to be delivered to him. (3 EHRT 375-77), Chang testified that she

recognized Exhibit 140 as a letter that she had written to Perle explaining that she was sending him three tapes. However, Chang recalled that she had sent a box of tapes, but could not recall if that was before or after the letter, which was dated September 17, 1997. She also recalled having a cashier's check for $1575 delivered to Perle. (Id. at 378-79, 383). The copy of the cashier's check included a notation, "Regarding Francisco Chavez Ayon voice expert," which was in her handwriting. (Id. at 383). Chang spoke to Perle "many times", but she did not speak to Perle about his conclusions and does not recall ever seeing a report from Perle. However, she was aware that Romero talked to Perle after the tapes had been delivered. (Id. at 379-80, 385). She recalled that petitioner's wife and daughter frequently came into the office to meet with Romero. Chang testified that she was familiar with Romero's handwriting and when shown Exhibit 138, she testified that it appeared to be Romero's handwriting. The Exhibit appeared to be a witness list and it included the names of petitioner's wife and daughter as well as that of Norman Perle. (Id. at 380-82).

After the conclusion of the Evidentiary hearing, respondent introduced the declaration of Richard J. McIlvery ("McIlvery") as an expert in response to petitioner's unexpected recall of dr. Ladefoged to present evidence concerning his analysis of the new voice exemplar he had prepared. (See 4 EHRT 441-42; 5 EHRT 675). McIlvery is an associate professor and chairperson of the University of Southern California

Music Industry Department. He has extensive experience as a record producer and recording engineer and is familiar with the operating principles and practical limitations of analog cassette tape recorders and computer digital hard drives. (See Lodgment of July 19, 2004, Declaration of McIlvery, at ¶¶ 1-8). Analog recording devices "are speed sensitive: if the tape travels at a higher speed during playback than during recording, it will sound higher in pitch." Although cassette tapes are "extremely sensitive to speed variations," manufacturers of cassette recorders make no effort to build products with stringent tolerances. In McIlvery's experience, even cassette recorders aimed at the professional, as opposed to the consumer, market regularly run at different speeds from one another and hold their calibrated speed settings for no more than a few days. Further, all cassette recorders are "sensitive to vibration and temperature," which results in variations in transport speed. (Id. at ¶¶ 10-18). Due to the low quality of consumer machines, speed variations over a period of time can exceed four percent, which "translates into a variation of four percent in perceived frequency." (Id. at ¶¶ 14, 19). Moreover, every time a recording is re-recorded, it is subject to degradation in fidelity resulting from imperfections in the recording process. "Each subsequent dub adds imperfections and abnormalities to the existing signal." Although digital audio recordings do not suffer from the same problems with transport speed and the resulting frequency errors as do cassette recorders, any comparison between a recording made on a cassette

recorder and a digital recording "must take into account the instability of the cassettes." (Id. at ¶¶ 20-21).

McIlvery listened to petitioner's exhibits 15-A, 17-A, and 19-A. In his opinion, the recordings "are all of very low quality" that indicates they were recorded on inferior recording equipment. Exhibit 15-A clearly demonstrates low-speed instability in the change in the pitch of the telephone ring tone that can be heard at the beginning of the recording. Finally, McIlvery reviewed Ladefoged's report of June 5, 2004, which compares the original voice exemplar to Exhibit 15-A. it is McIlvery's opinion that, "[g]iven the instability" of Exhibit 15-A, he does not "believe that it constitutes a reliable basis for measuring the frequencies of the original signal with any degree of accuracy." The same limitations would exists with respect to the other tapes that he heard. (Id. at ¶¶ 22-23).

No. 05-56732

---

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

FRANCISCO CHAVEZ-AYON,
Appellant-Petitioner,

v.

DEPARTMENT OF CORRECTIONS,
Respondent.

---

MOTION FOR CERTIFICATE OF APPEALABILITY
Central Dist. Cal. Civ. SACV 02-5564-JVS(RNB)
Hon. James V. Selna

---

PHILIP A. DeMASSA
Attorney at Law- # 47667
PHILIP A. DeMASSA APC
2356 Moore Street
Suite 201
San Diego, CA 92110
Telephone: (619) 294-2777
Facsimile: (619) 294-2120
Attorney for Appellant-Petitioner
FRANCISCO CHAVEZ-AYON

Appellant Francisco Chavez-Ayon (hereinafter "appellant"), by and through his attorney Philip A. DeMassa, of Philip A. DeMassa APC, hereby moves this Court for a Certificate of Appealability ("COA") pursuant to Federal Rules of Appellate Procedure 4, 22(b), 27, and Ninth Circuit Rule 22-1.

## COURSE OF PROCEEDINGS

Appellant was convicted after jury trial of various narcotics offenses in Los Angeles County Superior Court in 1997. He was sentenced in 1998 to 32 years in prison and is currently incarcerated at the California state prison at Norco without bail. Appellant's direct appeal was denied in the state courts of appeal. The Second District Court of Appeal's unpublished decision is attached hereto as Exhibit 1. Appellant filed a writ of habeas corpus in the state courts which was denied and his petition for hearing was denied by the California Supreme Court July 10, 2002. Appellant filed the instant writ of habeas corpus on July 15, 2002.

After briefings and evidentiary hearings, the district court adopted the magistrate judge's report and recommendation ("report") to deny appellant's writ on August 25, 2005. A copy of the report is attached hereto as Exhibit 2 and the order as Exhibit 3. The district court denied appellant's motion for a certificate of appealability on November 10, 2005. A copy of the denial is attached hereto as Exhibit 4.

To summarize, federal agents intercepted "Pancho" talking with a supplier about a large cocaine delivery. Agents followed a loaded van to a residence which disappeared down a driveway, departing later much lighter. Several days later appellant drove up and entered the residence. A Ford Tempo drove down the driveway, left shortly thereafter and was searched revealing 50 kilos of cocaine in green trash bags. Officers went to the residence and detained appellant and Efrain Mendoza-Larios. Objects similar to those in the Tempo were found in the residence and garage. Without a Miranda warning agents questioned appellant about why he was there and whether he'd seen the Tempo, which he denied. Appellant said he was there to visit his girl friend and their baby and to take Larios to lunch. After agents found a large amount of cocaine next door appellant was arrested and, after a defective Miranda warning, was again questioned about whether he'd seen the Tempo.

To prove appellant was Pancho prosecution witnesses claimed the voice on the intercepts was appellant. Although appellant's counsel hired a voice expert he failed to further investigate or present any evidence to show appellant was not Pancho either in the form of a voice comparative analysis or readily available witnesses at the scene who knew either Pancho or his voice.

To prove appellant was not a mere visitor the prosecution introduced other crimes evidence of a search conducted via a warrant several years earlier that a drug expert said showed appellant was a high level drug dealer in millions of dollars of cocaine dealings. Appellant's trial counsel did not file a motion to suppress this evidence or seek limiting motions to limit the prejudicial impact of this evidence.

The state appellate opinion affirmed the convictions, and in allowing into evidence the prejudicial other crimes evidence, found reason for so doing by raising the central question: "What was Ayon doing there? Was he merely an innocent visitor as he claimed, or was he part or was he part of the drug operation?" Exh. 1 at 16. Appellant's inability to answer this question formed the basis for his writ. The court committed constitutional error in failing to find as a matter of law that he was arrested when officers came to the door, thereby triggering Miranda warning. Trial counsel was ineffective in not interviewing or calling the various persons who were available to explain that appellant was just an innocent visitor to the house and was not the Pancho on the intercepts. Despite the fact that trial counsel retained a voice expert, he failed to take any steps to introduce evidence that Pancho on the intercepts was scientifically not appellant. Despite clearly established constitutional law showing the lack of probable cause for the warrant which led to the seizure of the prejudicial other crimes evidence, trial counsel

failed to move to suppress it or seek limiting instructions. This triad of errors led to appellant receiving a fundamentally unfair trial without due process.

## I
## APPELLANT IS ENTITLED TO ISSUANCE OF A CERTIFICATE OF APPEALABILITY ON ALL ISSUES RAISED IN HIS PETITION

A certificate of appealability may issue in a habeas corpus proceeding if the appellant has made a substantial showing of the denial of a constitutional right. Title 28 U.S.C. § 2253(c)(2). The "substantial showing" requirement is "relatively low." Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2004); Williams v. Woodford, 384 F.3d 567, 583 (9th Cir. 2004). The standard permits appeal where appellant "can 'demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [differently]; or that the questions are adequate to deserve encouragement to proceed further.'" Jennings, 290 F.3d at 1010 (internal quotes and cites omitted).

Where, as here, a district court has rejected the constitutional claims on the merits, "[T]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 1600 (2000); Tennard v. Dretke, _ U.S. _ , 124 S.Ct. 2563, 2569 (2004). Doubts about

the propriety of issuance of a COA must be resolved in the appellant's favor. Williams, supra, 384 F.3d at 583; Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000), citing Barefoot v. Estelle, 463 U.S. 880, 892 , 103 S.Ct. 3383 (1983). A COA should be granted unless the claims are "utterly without merit." Issuance of a COA does not mean a writ will be granted; the showing an appellant must make to be heard on appeal is less than that to obtain relief on the merits. Lambright, 220 F.3d at 1025, fn. 4.

The ultimate success of the appeal is not a necessary factor to consider, "obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." Barefoot, supra, 463 U.S. at 893, fn. 4.

> Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. .... We do not require petitioner to prove, before the issuance of a COA, that

> some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Miller-El v. Cockrell, 537 U.S. 322, 337-38, 123 U.S. 1029, 1039-40 (2003). The Court considering whether to grant a COA does not make a definitive inquiry into whether the writ will be granted; rather, the decision is a "threshold inquiry". "The question is the resolution of the underlying constitutional claim, not the resolution of that debate." Miller-El, supra, 537 U.S. at 342.

The COA requirement constitutes a "gate keeping mechanism that prevents [the Court] from devoting judicial resources on frivolous issues while at the same time affording habeas petitioners an opportunity to persuade [the Court] through full briefing and argument of the potential merit of issues that may appear, at first glance, to lack merit." The COA standard is "modest" and should be granted where an appellant has facially alleged the denial of a constitutional right. Lambright, supra, 220 F.3d at 1025, 1028. Appellant has done so on each claim.

## II
## APPELLANT WAS DENIED A FAIR TRIAL WHEN

**HIS STATEMENTS OBTAINED IN VIOLATION OF MIRANDA WERE INTRODUCED AT TRIAL**

Petitioner argued that since the officers had probable cause to arrest him after they stopped the Tempo his first non-Mirandized interview seeking incriminatory admissions about the Tempo was illegal and it infected his second defective Miranda interview. The report, citing the state appellate opinion, rejected appellant's argument. The report found the state court factual determinations presumably correct and appellant did not rebut the presumption by clear and convincing evidence. Title 28 U.S.C. § 2254(e)(1). Exh. 2 at 38-43.

The report, although correctly noting the determination of whether one is in custody for Miranda purposes is a mixed question of fact and law, then incorrectly found against appellant by improperly focusing on the "scene- and action-setting questions" as if that was the entirety of the custody analysis. While the scene and action-setting questions may be presumed correct, it is clear from the report's cited case, Thompson v. Keohane, 516 U.S. 99, 111-12, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) that such an analysis was only one half of the inquiry. The question of custody is a legal one since it is a mixed question of law and fact calling for the application of the controlling legal standard to historical facts. The ultimate custody question requires "independent review" and the "presumption of correctness" standard (relied on in the report as the end

of its analysis) is "not dominant here." Thompson, 516 U.S. at 112-13. The report erred in not applying clearly established law to the facts. And in ignoring facts that establish without doubt appellant was arrested from the start thereby triggering Miranda advisals.

Custody occurred when the state court found, after entry, that with five or six officers in the house appellant and Mendoza were "taken into separate rooms...[the officer] would not have allowed Ayon to wander around the house unaccompanied while the search was going on... although Ayon was not free to leave, he had been legitimately detained during a search for drugs and weapons in order to insure officer safety.." Exh. 2 at 39-40. The report agreed that petitioner was then in custody: "petitioner argues correctly that he was not free to leave during the initial search of the residence." Exh. 2 at 43. It follows that since he was not free to leave and his freedom was severely limited to one room, appellant fits the text book definition of one under arrest as he was "taken into custody *or otherwise deprived of his freedom of action in any significant way.*" Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966)(italics supplied).

The report was further incorrect when it found appellant had failed to produce evidence to rebut the trial court's factual determinations. Exh. 2 at 17. Appellant noted in his traverse at pp. 34-35 uncontradicted facts showing police had probable cause to arrest him when

they approached: intercepted calls two days earlier connecting the same van to cocaine seizures of 148 and 227 kilos; that van was heavily loaded driving to the residence and light when it left; the driver was the same person, Roberto Ramirez, who was stopped driving the Tempo; officers believed as they approached the house that at least 250 kilos were inside and 50 kilos in green trash bags, and a cell phone and pager, were found in the Tempo Ramirez was driving; a cell phone and similar green bags were at the house; binoculars for a lookout were in a front bedroom window and a narcotic dog alerted on a suitcase in the same room. These facts, as numerous cases and search warrants attest, are probable cause to arrest, not to merely detain. Custody is reviewed de novo: how would a reasonable man in appellant's place understand his situation? United States v. Hayden, 260 F.3d 1062, 1066 (9th Cir. 2001), cert. denied, 534 U.S. 1151 (2002).

The second interview was damaging as police, without obtaining a valid waiver, were told appellant denied knowing Ramirez or the people next door, the Tempo or when he arrived at the house Appellant is entitled to de novo review of these Miranda claims.

## III
## COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND CALL AVAILABLE WITNESSES

To answer the appellate court's question, "what was appellant doing there, was he an innocent visitor or part of the drug operation?", appellant's new counsel prior to his sentencing presented declarations from Mendoza-Larios (in the house with appellant), Ramirez (driver of the van and Tempo), Juan Chavez Ayon (found at adjacent drug house), and the translator of Rafael Alapizco (intercepted talking with Pancho), all of whom swore appellant was not Pancho and that he was indeed an innocent visitor to the house when arrested. In state court, the prosecution presented *no* evidence to explain why former counsel failed to interview these witnesses who were legally available as they had pleaded guilty to the same crimes and sentenced. Appellant's argument was rejected without any response from former counsel as to what he did, or failed to do, and what his tactical reasoning was, if any.

The appeals court affirmed this ruling since 1) the men had pleaded guilty which undermined their credibility, meaning they had nothing to lose in exonerating appellant and 2) there was no indication counsel was unaware of the men or what the men would say. Exh. 1 at 20, Exh. 2 at 54. The report "concurred" with the state's reasoning and conclusions, finding trial counsel made a reasonable tactical decision not to interview or call the witnesses. Exh. 2 at 56-57. Both the state court and district court's decision upholding facts which never existed resulted in a decision contrary to, or involved an unreasonable application of clearly

established federal law, and was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(1)(2).

First, it is a violation of federal law to rule that a felon cannot as a matter of law be a competent witness. It is a violation of the Sixth Amendment to preclude co-defendants from testifying on one another's behalf. A defendant cannot be "denied ... the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to his defense." Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925 (1967)(defendant wanted to call a convicted co-defendant who'd been sentenced to 50 years in prison). To follow the state court's reasoning, Washington was wrongly decided since felons are automatically impeached. "[T]ruth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury...." Id, 388 U.S. at 22. Further, there is no evidence trial counsel stayed away from these witnesses due to their felony status.

Equally clear is the decision was based on an unreasonable determination of the facts in light of the evidence at the hearing. The disputed hearing relied on

is the one where the state court considered appellant's declarations. The prosecutor presented *nothing*. It thus defies credulity the report could find trial counsel knew the witnesses were available, what they would have stated and then made a tactical decision not to call them. There was no evidence to support any such findings. These are creations of fact. "We will not assume facts not in the record in order to manufacture a reasonable strategic decision for ... trial counsel." Alcala v. Woodford, 334 F.3d 862, 871 (9th Cir. 2003). Further, the witness declarations all stated trial counsel had not interviewed them; hence there was evidence in the record to contradict the report's finding that he knew what they would have stated. Appellant established there was deficient performance, the first component of an ineffective assistance of counsel claim. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The report further erred in finding appellant failed to establish the second component of an ineffective assistance claim-prejudice. Id. Appellant's claim of prejudice was only first reviewed by the district court which considered it de novo. Exh. 2 at 41-48. Appellant is entitled to a review of this decision.

Instead of noting the prospective testimony of the missing witnesses which a jury could consider, the report reviewed and dismissed the efficacy of the testimony as it found no prejudice would have resulted. Such a ruling,

however, violated the thrust of the appellate question: how could appellant explain he was only an innocent visitor to the house? The report would not allow the question to be answered by appellant, only by the prosecution. By failing to allow him to answer the appellate question, appellant showed prejudice.

A defendant has a constitutional right to present a "complete defense." Crowe v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146 (1986); Green v. Lambert, 288 F.3d 1081, 1090 (9th Cir. 2002). In this instance, appellant's defense would call the witnesses to explain his presence. Appellant's constitutional right to present a defense cannot be abrogated by a determination that even with their testimony a different outcome was not reasonably probable. The report's determination that each witness by himself would not establish prejudice is as erroneous as a trial court hearing each witness' testimony in a F.R.Evid. Rule 103(a) in limine hearing and then disallowing the testimony before the jury.

In other cases this Circuit has not made a credibility determination made by the report herein as a prerequisite to considering prejudice. Rather, the defendant's missing witness testimony's impact was considered and "if believed" or it "could have undermined the prosecution's case", or there was a "possibility that their testimony would have led to [defendant's] acquittal", then it was sufficient to undermine confidence in the trial's outcome. Lord v.

Wood, 184 F.3d 1083, 1096 (9th Cir.); Alcala , supra., 334 F.3d at 872-73.

And, the report, in failing to find prejudice, analyzed each witness' testimony singly and not cumulatively. Appellant objected several times since Strickland and the Circuit require all the errors to be considered together. 460 U.S. at 694; Alcala, 334 F.3d at 888-89; Benn v. Lambert, 283 F.3d 1040, 1052-53 (9th Cir. 2002). Finally, the report failed to accord deference to or apply the evidentiary standard set forth in Strickland that the trial can be considered unreliable "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Strickland, 466 U.S. at 694.

## IV
## TRIAL COUNSEL WAS INEFFECTIVE DUE TO HIS FAILURE TO MOVE TO SUPPRESS EVIDENCE, TO RAISE CONSTITUTIONAL OBJECTIONS TO OTHER CRIMES EVIDENCE, TO SEEK A BALANCING DETERMINATION OR LIMITING INSTRUCTIONS, AND TO PRESENT EXPERT TESTIMONY HE WAS NOT PANCHO

A. Failure to suppress evidence from the 1993 search warrant.

To establish appellant was not a mere visitor, the prosecution introduced other crimes evidence seized pursuant to a 1993 search warrant and drug expert testimony relying on it: pay/owe sheets showing sales of kilo quantities of cocaine totaling more than one million dollars; documents linking appellant to 7 properties; $800,000 in wire transfers to Mexico in the 17 days prior to the warrant's issuance; $100,000 in checking accounts, showing appellant was a "high level distributor of cocaine." Exh. 2 at 77-8. Trial counsel never moved to suppress this evidence.

Although the report found appellant failed to establish deficient performance since a motion attacking the warrant's lack of probable cause would not have been granted (Exh. 2 at 79-80), the district court's order adopting the report found a different rationale: that the 1993 search was outside the "zone of primary interest", and the deficient performance claim would therefore fail even if the warrant was in fact deficient. Exh. 4 at 115. This ruling is error. The district court must have concluded that the warrant was clearly deficient or lacked probable cause, as appellant contended, and adopted the alternate "zone" theory.

The "zone of primary interest" theory primarily rested upon United States v. Medina, 181 F.3d 1078 (9th

Cir. 1999), cert. denied, 529 U.S. 1056 (2000). This is an issue debatable among jurists of reason. Jennings, supra, 290 F.3d at 1010. Not only does Judge Fletcher's dissent in Medina establish there are jurists of reason who disagree but the "zone" theory conflicts with Supreme Court and other circuit law, most notably Elkins v. United States, 364 U.S. 206, 223, 80 S.Ct. 1437 (1960); United States v. Perez-Castro, 606 F.2d 251, 253 (9th Cir. 1979); United States v. Hill, 60 F.3d 672, 680 (10th Cir.), cert. denied, 516 U.S. 970 (1995).

Even if the "zone" theory is valid, it would not apply to appellant since local drug agents were the ones involved in both the 1993 and instant prosecution. This is not a frivolous issue and the application of clearly established law to the facts is debatable since the law is in conflict even within the Circuit and the Supreme Court. There is a clear dispute as to whether ongoing drug investigations are materially different than the factual distinction raised in Medina (an illegal vehicle search and a later federal robbery prosecution).

**B. Failures to object on constitutional grounds, to seek a balancing prejudice vs. probative analysis, and to seek limiting instructions when other crimes evidence was introduced and in jury instructions.**

Appellant argued trial counsel was deficient in failing to object to the introduction of other crimes

evidence, failing to seek a balancing analysis under California Evidence Code § 352 ("352") that its probative value was outweighed by it undue prejudice, and failed to seek limiting instructions when the evidence was both received and when the jury was instructed. The district court order acknowledged that the report failed to discuss the 352 issue but held the magistrate judge found no prejudice was shown. Exh. 4 at 115-16. This ruling is illogical. The district court could not uphold the magistrate's finding of no prejudice when the magistrate admittedly never considered the 352 issue at all.

As to the his claim that trial counsel failed to raise a Confrontation Clause objection to the writings being introduced since they could not be tied to appellant, the report did not address it or mischaracterized it as foundational and irrelevancy objections . Exh. 3 at 76. The district court addressed this issue in a similar fashion: although the magistrate never addressed the issue, it still was appropriate to conclude the magistrate found no prejudice. Again, the magistrate could not find prejudice when it did not rule on the error. The district court did note that trial counsel did raise prior crimes under California Evidence Code § 1101(b) but this was seven months before trial. Exh. 4 at 3, fn. 3; Clerk's Transcript 2/18/99 at 44. When the matter was considered during trial, counsel never raised these fundamental objections so necessary to adequately represent his client.

Even trial counsel's § 1101(b) motion showed he misunderstood the issue. He argued that since appellant was never arrested, charged or convicted of any crimes, such was sufficient reason for exclusion. However, a myopic view of bad act evidence as only referring to crimes is wrong as § 1101(b) refers to a crime, civil wrong or other act. Even acquittals or any acts are admissible to prove a material issue. United States v. Hinton, 31 F.3d 817, 822-23 (9th Cir. 1994); United States v. Castro-Castro, 464 F.2d 336, 337 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973); United States v. Rocha, 553 F.2d 615, 616 (9th Cir. 1977).

When arguing his § 1101(b) issue, trial counsel showed his lack of competence by insisting the evidence did not show a crime was shown. When the court pressed him "for strategic reasons you prefer not to believe this [evidence of uncharged offenses]?," counsel refused to be "pigeon holed" since the evidence was "insufficient" to warrant a limiting instruction. Counsel incorrectly did not believe it was scant evidence of other crimes, although "I may be wrong." 10 RT 2188-89. The failure to object and to raise other fundamental objections are deserving of a COA. Further, although the district court acknowledged these errors, and despite appellant's urging that a required cumulative error analysis be done, no such attempt was made by the court. Nor were these errors considered cumulatively with the most serious one: failure to present a voice expert.

C. **Failure to present a voice expert.**

The third leg of the prosecution's case was the devastating voice comparison that appellant was Pancho. The report and order agreed that trial counsel was deficient in failing to have a voice expert compare appellant's voice with the intercepted voice of Pancho but concluded that no prejudice resulted after comparing the testimony of Dr. Peter Ladefoged with the overwhelming case against appellant. Exh. 3 at 89-91; Exh. 4 at 116-17. As in the witness issue argument, supra at pages 11-14, it is error for the district court to assess the credibility of the evidence and find it wanting when compared with the prosecution case. Dr. Ladefoged's opinion was that appellant was *not* Pancho. The magistrate judge's dissection of testimony that the tapes themselves were of poor quality or unreliable goes not to the reliability of the opinions but of the evidence that both sets of witnesses were relying on. Even that fact was one that was not presented to the jury: that the tapes were so unreliable they could not be used by the prosecution's lay witnesses for any rational judgment and comparison. However, despite the bad quality, Dr. Ladefoged was satisfied he had enough voice samples to conclude after scientific analysis (not voice judgment) that it was very unlikely the voices were of the same person. Standing alone, the failure to introduce a reliable voice expert like UCLA professor Ladefoged to rebut the prosecution's evidence was inherently prejudicial. The Pancho voice was intercepted talking about trafficking in

large amounts of cocaine. If such evidence were irrelevant, then it would not have been introduced in the first place. Voice testimony was sufficiently prejudicial that it required appellant to present his own from an unimpeachable source. Trial counsel recognized this responsibility but failed to act. Appellant did not receive a fair trial due to counsel's errors.

As in the other arguments, appellant objected that the analysis of this issue by the district court and magistrate judge was erroneous as it addressed the matter as a stand alone issue and not in conjunction with the other admitted errors. Prejudice cannot be determined as to each issue when analyzed without consideration of the other errors. Strickland speaks in the plural of "errors" and it is Constitutionally required to examine the claims together. A determination of whether trial counsel was ineffective on one ground cannot be considered alone as it is also interwoven with all other alleged errors so the Court must view them cumulatively. Alcala, supra, 334 F.3d at 888-89.

## CONCLUSION

For the reasons set forth above, appellant asks the Court to grant a certificate of appealability on all the issues raised in this motion.

Dated: December 14, 2005 Respectfully submitted.

Philip A. DeMassa
Attorney for Appellant
FRANCISCO CHAVEZ-AYON

**PROOF OF SERVICE**

Title of Case: Ayon v. Department of Corrections
Court of Appeal No. 05-56732
Central District of California Civ.
02-5564-JVS(RNB)

I am employed in the County of San Diego, State of California. I am over the age of eighteen years and am not a party to the within litigation. My business address is: 2356 Moore Street, Suite 201, San Diego, CA 92110.

On December 14, 2005, I served the following documents, the original and four copies on the Court of Appeal described as:

APPELLANT'S MOTION
FOR CERTIFICATE OF
APPEALABILITY

and by delivering a true copy thereof as follows:

PEGGY BRADFORD TARWATER
DEPUTY ATTORNEY GENERAL FOR
THE STATE OF CALIFORNIA
300 SOUTH SPRING STREET
SUITE 5000
LOS ANGELES, CA 90013

[ X ] By Mail: I caused such envelope(s) with postage thereon fully prepared to be placed in the United States mail or Federal Express at San Diego, California on December 14, 2005.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

PHILIP A. DeMASSA

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SECOND APPELLATE DISTRICT DIVISION THREE**

| | |
|---|---|
| THE PEOPLE, | )B120572 |
| | ) |
| Plaintiff and Respondent, | ) Super. Ct. No. |
| | ) BA127531 |
| | ) |
| v. | ) |
| | ) |
| FRANCISCO CHAVEZ AYON, | ) |
| | ) |
| | ) |
| Defendant and Appellant. | ) |
| | ) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Maureen Duffy- Lewis, Judge. Affirmed as modified.

Philip A. DeMassa for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, Marc J. Noland and Richard B. Cullather, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Francisco Chavez Ayon, appeals from the judgment entered following his conviction, by jury trial, for conspiracy to sell cocaine, possession of cocaine for sale, offering to sell cocaine, and possession of more than $10,000 obtained from drug sales, with principal armed and weight enhancements (Pen. Code, §§ 182, 12022; Health & Saf. Code, §§ 11351, 11352, 11370.6, 11370.4).[23] Sentenced to a state prison term of 35 years, Ayon contends there was trial and sentencing error.

The judgment is affirmed as modified.

## BACKGROUND

Viewed in accordance with the usual rule of appellate review *(People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

---

[23]All further statutory references are to the Penal Code unless otherwise specified.

1. *Prosecution evidence.*

In the fall of 1995, DEA Special Agent Dave Marzullo, a member of a multi agency task force investigating narcotics trafficking, was conducting a federal wire tap on Rafael Alapizco, a major cocaine supplier. Alapizco used two houses in Bellflower to store cocaine. The police had installed video cameras in these houses.

On November 3, 1995, the wire tap recorded. a series of phone calls. First, a man called from Mexico and told Alapizco to get 300 kilograms of cocaine ready for Pancho, the person to whom Alapizco had given 500 kilograms of cocaine two weeks earlier.

Alapizco said he had Pancho's telephone number. (When Alapizco was subsequently arrested, he had a piece of paper on which was written: "Pancho," the telephone number "[(213)] 999-2958," and the number "500.") The caller told Alapizco not to contact Pancho until everything was set. When the man called back, Alapizco confirmed that Pancho "wanted the three." Alapizco then called (213) 999-2958. The man who answered identified himself as Pancho. Alapizco said he was the person from the other day who had the maroon van. When Pancho indicated he was waiting for a call from Mexico, Alapizco said he was calling on his behalf. A meeting was arranged. About 3:30 p.m.,

Alapizco called Pancho again and asked how long it would take for his people to arrive. Alapizco agreed to meet at 5:00 p.m. at a hamburger stand arid said he would leave the keys in the ashtray. Based on prior information, surveillance was set up at a McDonald's restaurant in Lakewood. Alapizco called Pancho back to say the meeting would be at 4:00 p.m.

At 4:00 p.m., a maroon van left one of Alapizco's Bellflower houses and drove to the McDonald's. Roberto Ramirez got into the van and drove away. He was followed to a house at 2641 E. Jackson, where the van disappeared up the driveway. Forty minutes later, Ramirez again drove off in the van. Surveillance was set upon the 2641 E. Jackson house.

Between 10:20 and 10:30 a.m. on November 5, 1995, defendant Ayon drove up to 2641 E. Jackson and went into the house. Between 10:40 and 10:50 a.m., Ramirez arrived in a gray Ford Tempo and disappeared up the- driveway. Ramirez drove away from the house about 11:30 a.m. and was stopped by police. He had 50 kilograms of cocaine in the trunk. At 11 :45 a.m., Orange County Deputy Sheriffs John Ortega and Rodolfo Garcia approached the front door of2641 E. Jackson, where they encountered Ayon, who let the officers enter and search the house. There was a cell phone on a couch; the number of this phone was (213)

999-2958 -the same number Alapizco had been calling. Officer Scott McKnight walked up the driveway of2641 E. Jackson. He saw two cars parked in the backyard. Behind some trees and bushes, there was a break in the wooden fence separating 2641 E. Jackson from the house next door, 2639 E. Jackson. There was a makeshift gate across the break in the fence, and a pathway connecting the two properties. Juan Chavez Ayon let McKnight and another officer into the house at 2639 E. Jackson. McKnight noted a chemical odor related to narcotics. Jesus Lara and Jose Ontiveros were in the living room. A loaded handgun was protruding from a sofa. Subsequently, a shotgun, a money counting machine, piles of currency and 450 kilograms of cocaine were found in the house.

Alerted to this discovery, Officer Garcia visited 2639 E. Jackson, where he saw the cocaine, guns, and money. He talked to the three suspects and determined the cocaine had been brought to the house from the direction of the pathway joining the two properties. One of the suspects, Juan Chavez Ayon, denied being related to defendant Ayon. Garcia returned to 2641 E. Jackson, where he arrested Ayon, gave him a *Miranda* warning, and questioned him. Ayon denied knowing either Ramirez or Juan Chavez Ayon.

Ayon's car was registered at an address on Domart St., and a search of that location turned up a traffic citation issued to Roberto Ramirez, and airline tickets in the names of Ayon, Ramirez, and Juan Chavez Ayon for a trip to Las Vegas on September 29, 1995; other records showed they had flown back to Los Angeles the following day. Ayon had made 22 trips to Las Vegas in 1994 and 1995, and he had gambled more than $800,000.

Ervie Pena, a professor of Spanish, listened to tapes of the November 3, 1995, phone calls, as well as to an exemplar of Ayon's voice. Pena testified the voices were the same. James Chiu, a wire tap monitor, had been present when Ayon provided the voice exemplar. Chiu testified Ayon's voice was the same as Pancho's voice in the November 3, 1995, tapes.

2. *Defense evidence.*

Irlanda Soto, the mother of Ayon's baby, testified she went to 2641 E. Jackson on Friday afternoon, November 3, 1995, to meet with Ayon. She left about 9:30 a.m. on Sunday, November 5, 1995, without having seen him. Rosario Hernandez Lopez had known Ayon for 19 years. Ayon had lived in Hernandez's rental property at 1217 Mulberry St. in Compton from 1981 to 1991, and Ayon's half brother Nicolas had lived there from 1991 through November 1995.

Jose Garcia and Ayon operated a sand transporting business in Compton. Garcia never saw Ayon in possession of a cell phone.

## CONTENTIONS

1. The trial court erred by admitting Ayon's *Miranda-violative* statements.

2. The trial court erred by admitting voice identification evidence.

3. The trial court erred by instructing the jury on consciousness of guilt.

4. The trial court erred by admitting other crimes evidence.

5. The trial court erred by denying a motion for new trial based on ineffective assistance of counsel.

6. The trial court lacked jurisdiction to re-sentence Ayon.

7. The trial court denied Ayon a fair trial by committing judicial misconduct.

## DISCUSSION

1. *No Miranda violation.*

Ayon contends the trial court erred in admitting statements he made to police in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. This claim is meritless.

Officer Garcia testified at the preliminary hearing that he and Officer Ortega went to the spot where Ramirez had been stopped, and saw the cocaine in the trunk of Ramirez's car. Garcia and Ortega then returned to 2641 E. Jackson at 11:47 a.m., thinking that the rest of the cocaine might be inside the house. They went to the front door and saw Ayon standing in the doorway. Ortega told Ayon they were doing a drug investigation and asked for permission to enter the house. Ayon gave his consent. There was another man inside, Efrain Larios-Mendoza. Both Ayon and Larios-Mendoza gave consent for the officers to search the house. At that point, five or six other officers entered and began searching. Ayon and Larios-Mendoza were taken into separate rooms. Ayon was not handcuffed and, although Garcia did not say he couldn't leave, Garcia testified he would not have allowed Ayon to wander about the house unaccompanied while the search was going on. He asked Ayon who lived at the house, if he lived there, where he was from, how long he had been in the U.S., and what he was doing at the house. Ayon said he didn't live there and that he had arrived about

one minute before the officers. He had come to visit Larios-Mendoza and take him out to lunch. He told Garcia he lived at 124 North Pearl in Compton, but when Garcia asked him for consent to search that house, Ayon said he used to live on North Pearl, but that he now lived in Tijuana. When Garcia asked if he had seen the gray Ford Tempo, Ayon said he hadn't seen any vehicle arrive or leave in the time he'd been there. Garcia's conversation with Ayon lasted 10 or 15 minutes.

While Garcia was talking to Ayon, other officers searched 2639 E. Jackson and discovered the drugs, guns, and money. After Garcia learned of these findings and made a visit to the house next door, he put Ayon under arrest. Garcia then *Mirandized* Ayon and asked him exactly the same questions he had asked before. Ayon gave basically the same answers. Garcia's second conversation with Ayon took place about an hour after the first conversation.

Based on the preliminary hearing testimony, the trial court held Garcia's first conversation with Ayon did not violate *Miranda* because there was no suggestion of any coercion or threats and, although Ayon was not free to leave, he had been legitimately detained during a search for drugs and weapons in order to insure officer safety; therefore, Ayon was not in custody until the

arrest. We agree with the trial court that, in these circumstances, no *Miranda* warning was required.

It is well-established that a suspect, temporarily detained by police lacking probable cause to make an arrest, need not be given *Miranda* warnings as long as the questioning is brief and casual. The model for this situation is "the usual traffic stop [which] is more analogous to a so-called *'Terry* stop,'.. .than to a formal arrest." *(Berkemer* v. *McCarty* (1984) 468 U.S. 420, 439, fn. omitted.) "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in *our* opinions that *Terry* stops are subject to the dictates of *Miranda." (Id.* at pp. 439-440, fns. omitted; see *People* v. *Aguilera* (1996) 51 Cal.App.4th 1151, 1165 *[Miranda* generally inapplicable to *Terry* stop because "the restraint on liberty often occurs in a nonthreatening *or* non compulsive public environment and its duration is limited," whereas *Miranda* is triggered when interrogation becomes coercive and reasonable person understands he must "remain for questioning indefinitely at the sole discretion of the officers and [is]

not free to leave until ...the officers' demand for the truth" is satisfied]; *People* v. *Forster* (1994) 29 Cal.App.4th 1746, 1753-1754 [although detention for an hour was relatively long, where there was reasonable explanation because federal customs office had to get local police to conduct Dill investigation -and defendant was detained in a public area, without restraints, and questioning was not compulsive, there was no custody for *Miranda* purposes]; *People* v. *Vasquez* (1993) 14 Cal.App.4th 1158, 1163 [no *Miranda* warning required where pedestrian stopped by officer who asked if he was selling drugs because defendant not arrested, led to believe stop would be prolonged, told he was focus of investigation, or confronted with incriminating evidence].)

In *People v. Clair* (1992) 2 Cal.4th 629, police officers investigating a burglary report found the defendant hiding in a bed. The officers confronted him with drawn guns, ordered him not to move, and asked him a series of questions (who he was, if he had identification or lived in the apartment, what he was doing there, whether he knew the occupants). *Clair* held that in these circumstances the defendant had not been in custody or interrogated; he had merely been subjected to legitimate questioning during a temporary detention and, therefore, no *Miranda* warning was required. *(Id.* at pp. 679-680.) Ayon tries to distinguish *Clair* by arguing that Garcia and Ortega "already knew suspicion

was focused directly on appellant and his present criminal involvement in the house from which the cocaine. ..had just left." Not necessarily; after all, this was Ayon's first known appearance in the investigation. In any event, "any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of *Miranda." (Stansbury v. California* (1994) 511 U.S. 318, 326.) We conclude, therefore, that there was no *Miranda* violation preventing admission of Ayon's answers to Garcia's initial questions. Given this result, there is no need to address Ayon' s claim that his same answers - given during his second conversation with Garcia - were inadmissible because the Spanish-version of the *Miranda* warnings was defective.

2. *Opinion testimony of voice identification.*

Ayon contends the trial court erred by admitting evidence that his voice was the one identified as Pancho in the intercepted telephone calls. This claim is meritless.

The trial court admitted the tapes of the November 3, 1995, intercepted telephone calls, ruling that "the People are still going to be held to the burden of showing who is speaking...." Ayon objected to the proposed testimony of Pena, a Spanish professor at Cal State Fullerton, who had worked as a wire tap monitor

and had experience doing voice identifications and transferring Spanish dialog from tapes. Pena listened to the November 1995 tapes, as well as to an exemplar of Ayon's taped voice that was created on May 30, 1996, while Ayon was incarcerated. Ayon objected that Pena was essentially offering improper voice identification expert testimony.

The trial court allowed Pena to testify for the following reason: "[I]t is unique in that in this case we have Spanish language speakers on tapes. So we're in the unique situation of not being able to listen to those tapes ourselves and as a jury, and get as much from them as somebody who is a native speaker. [¶] The court is going to allow Dr. Pena to testify. And the court is not cutting the defense's right off from making objections if a question seems to elicit information which is outside an area that this individual appears to be able to testify to, or, in the alternative, if he is attempting to testify to something that doesn't fall within the realm of appropriate expertise, or even as a lay witness." Pena testified the voice on the 1996 exemplar was the same person as the person identified as Pancho on the 1995 intercepted calls. On cross-examination, Pena conceded that although he had a strong opinion, he was not an expert in voice comparison.

Ayon argues Pena should not have been allowed to testify as an expert because he admitted he was not an expert in voice comparisons. However, despite the ambiguity of the trial court's explanation, quoted above, subsequent statements by the court demonstrate it had concluded that Pena was an expert at listening to tape-recorded Spanish voices. That is, the trial court did not allow Pena to testify because he was an expert at making voice comparisons, but because his acknowledged expertise as a Spanish-speaker presumably meant he would be able to make a voice comparison in this situation more easily and more accurately than an English-speaking juror. Ayon argues Pena had no way of knowing if the Pancho on the 1995 tapes was, in fact, Ayon because Pena was not familiar with Ayon' s voice. But other evidence showed that the 1996 exemplar was Ayon's voice, and thus Pena did not have to be independently familiar with Ayon's voice in order to make a valid comparison between the 1996 and the 1995 voices.

Ayon argues that single voice show-ups are dangerously liable to be faulty. But lay opinion voice identification testimony is commonly admitted, and evidence of a single person voice lineup is permissible so long as the identification is reliable under the totality of the circumstances. (See *People v. Clark* (1992) 3 Cal.4th 41, 135-137 [even if single-voice lineup was unduly suggestive and unnecessary, resulting

identification was reliable]; *People v. Sims* (1976) 64 Cal.App.3d 544,552-553 [voice identification procedure not unduly suggestive].)

3. *CALJIC No. 2.06 properly given.*

Ayon contends the trial court erred by instructing the jury on consciousness of guilt (CALJIC No. 2.06) in connection with a prosecution claim he tried to alter the sound of his voice on the 1996 exemplar in order to hinder identification.[24] Ayon argues the instruction was improper because the trial court had excluded the requisite evidentiary predicate. This claim is meritless.

Although the trial court had refused to allow the non-expert Officer Garcia give his opinion as to whether Ayon had tried to alter the sound of his voice during the taping of the 1996 exemplar, Garcia was allowed to testify he had spoken to Ayon four or five times on the day he was arrested, and that he thought Ayon's voice on the exemplar sounded very different from those earlier conversations. Asked how Ayon's tone was different, Garcia testified: "His voice was different – first of all, he was slouched down in the chair, in that

---

[24]The instruction read: "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by disguising his voice, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration."

his head was down like this, and then the pitch, his voice dropped. I mean, actually went high, way high. And he wasn't answering the questions fluently, basically real choppy." Ayon's voice "fluctuated" and "[i]t did not sound like him at all." Only at the very end of the exemplar taping did Ayon sound like he had in 1995.

Professor Pena testified that, in one portion of the exemplar, Ayon spoke informally while he was getting instructions on how to do the taping, whereas in another portion Ayon sounded artificial while reading into the tape recorder. Asked if Ayon tried "to do anything with his voice" on the exemplar, Pena replied: "I don't know if he attempted so much, per se, but his voice seems to be altered, I don't know if by him on purpose, but he was asked to be involved in an activity that is not a conversation situation.... He was asked to read. And they tried to ... get some voice samples on the basis of reading. [¶] However, the conversations that took place while they were giving him instructions when he was not reading were more common natural conversations, we had good voice samples of that."

Thus, contrary to Ayon's claim, foundational evidence showing possible voice alteration was admitted. CALJ1C No. 2.06 requires the jury to first determine if there was evidence of an attempt to suppress evidence - i.e., evidence that Ayon had

purposely tried to disguise the sound of his voice on the exemplar; only then could the jury treat this as consciousness of guilt evidence. The trial court properly allowed the jury to make this determination. Moreover, the trial court excluded lay testimony that Ayon had tried to disguise his voice, and the expert Pena testified he could not say if the alterations he heard had been conscious or not.

4. *Evidence of other crimes properly admitted.*

Ayon contends the trial court erred by admitting evidence of drug trafficking unrelated to this case. He complains there was no evidence connecting him to the other crimes evidence, and that the trial court failed to either balance probative value against prejudicial risk as required by Evidence Code section 352, or give an instruction like CALJIC No. 2.50 advising the jury this evidence was being introduced for a limited purpose only. This claim is meritless.

South Gate police officer Kenneth Edwards testified that on October 29, 1993, he executed a search warrant at 124 N. Pearl in Compton. Inside the house, which according to Edwards's information - was Ayon's residence, he found 'pay and owe' sheets showing sales of kilogram quantities of cocaine in an amount totalling

more than $1,000,000.[25] Along with the pay and owe sheets, he found Ayon's business cards and various documents (loan documents, insurance documents, utility bills) linking Ayon to seven different properties. Edwards found evidence that money had been wired to Mexico six times between October 6, 1993 and October 23, 1993, in an amount totalling more than $800,000. He found checking and savings accounts, in the names of Ayon or his wife, which contained more than $100,000. Edwards testified that in his opinion Ayon "is a high level distributor of cocaine." Other evidence connected Ayon to the Pearl St. house.

"Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. (Evid. Code, § 1101.) Evidence of uncharged crimes is admissible to prove identity,

---

[25]Edwards testified he knew, based on his experience, that pay and owe sheets are "numbers that keep track of the high level distribution of drugs and the money derived from the high level distribution of the illicit drugs." He testified, for instance, that the number "sixteen-five" on the sheets referred to "$16,500, that was the price of [a] kilo of cocaine around October' 93."

common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.]" *(People v. Kipp* (1998) 18 Cal.4th 349,369.)Ayon argues this evidence was irrelevant because no drugs were found at Pearl St. and the best the prosecution came up with "was that narcotics ledgers were seized from appellant's home." However, the presence of pay and owe sheets can provide evidence of drug trafficking. (See *People v. Blake* (1998) 68 Cal.App.4th 509,512 [presence of pay-owe sheets with multiple entries is evidence of multiple drug sales to different customers]; *In re Terry H.* (1995) 40 Cal.App.4th 1675, 1678, in. 4 [" "Pay/owe sheets' are commonly kept by drug dealers to record money or drugs owed to them, and money or drugs owed by them to other people."].) Such evidence is admissible - not as direct evidence of the particular drug transactions allegedly memorialized on the pay and owe sheets - but as circumstantial evidence that drug trafficking has occurred. (See *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1220-1225 [pay-owe ledgers properly admitted on non-hearsay basis as circumstantial evidence of cocaine sales and conspiracy because drug traffickers tend to keep records]; *U.S. v. Jaramillo-Suarez* (9th Cir. 1991) 950 F.2d 1378,1384 [evidence of pay-owe sheets properly admitted as other bad act evidence to show "character and use" *of* apartment where sheets found]; *United States v. Wilson* (8th Cir. 1976) 532 F.2d 641,

646 [notebooks properly admitted as circumstantial evidence to show character of place where found: "we view the declarations in the notebooks as utterances, used *circumstantially,* giving rise to the indirect inference that the apartment was the scene of drug sales and drug related activity"].)

Ayon argues the use of this evidence to prove intent was improper because he had "denied committing the acts ... in question." We disagree. It is undisputed that Ayon was found inside a house connected to a large scale cocaine trafficking operation. The question, therefore, became: What was Ayon doing there? Was he merely an innocent visitor as he claimed, or was he part of the drug operation? "Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense.... For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it." *(People* v. *Ewoldt* (1994) 7 Cal.4th 380, 394, fn. 2.) A similar analysis justifies the use of prior acts evidence to prove the quality of a defendant's knowledge. (See *People* v. *Goodall* (1982) 131 Cal.App.3d 129,142 [defendant's presence at past drug scene admissible to

show familiarity with PCP and, therefore, guilty knowledge and intent with respect to charged offense]; *People v. Hill* (1971) 19 Cal.App.3d 306,319-320 [evidence of defendant's subsequent narcotics offense admissible to show he intended to sell drugs].) Ayon's knowledge, intent and motive were all at issue in this case, and the other crimes evidence was legitimately admitted as going to these issues.

Ayon argues the trial court failed to balance the probative value of this evidence against its possible prejudicial effect under Evidence Code section 352, asserting "[t]he record must affirmatively show" the trial court did so. But the only authority cited for this proposition is *People* v. *Green* (1980) 27 Ca1.3d 1,25, where the defendant explicitly objected to the evidence on the ground its prejudicial effect outweighed its probative value. Ayon does not assert he made a similar objection. Ayon argues the trial court erred by failing to give the jury an instruction such as CALJIC No. 2.50 that would have advised that this evidence was being admitted for only a limited purpose. There was no error. "We have long. ..held that 'in general, the trial court is under no duty to instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct.' *(People* v. *Collie* (1981) 30 Cal.3d 43,64 ..., fn. omitted.) Although our opinion in *Collie* recognized the possibility (one that had no application in that case) that there might be 'an occasional extraordinary case in

which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and *minimally relevant to any legitimate purpose'* [citation], this is not such a case." *(People* v. *Padilla* (1995) 11 Cal.4th 891, 950, disapproved on other grounds by *People* v. *Hill* (1998) 17 Cal.4th 800, 823, in. 1.) Neither is the case at bar:

5. Effective assistance of counsel.

Ayon contends the trial court erred by denying a new trial motion based on ineffective assistance of counsel. He complains defense counsel failed to interview the other people arrested along with him - Ramirez, Larios-Mendoza, Ontiveros, Lara, and Juan Ayon -who would have testified he had nothing to do with the drug operation. This claim is meritless.

A claim of ineffective assistance of counsel has two components: " ' First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] [¶] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an

objective standard of reasonableness.' [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" *(Williams* v. *Taylor* (2000)_U.S._ [120 S.Ct. 1495; 1511-1512].) The ineffectiveness must "deprive the defendant of a substantive or procedural right to which the law entitles him." *(Id.* at p. -[120 S.Ct. at p. 1513, fn. omitted.) "[T]here are situations in which the overriding focus on fundamental fairness may affect the analysis." (Id. at p.__ [120 S.Ct. at p. 1512].)

To establish ineffective assistance of counsel, a defendant is required to show more than counsel's failure to interview or call available witnesses. (See *People* v. *Bunyard* (1988) 45 Cal.3d 1189, 1215 [deference is shown to counsel's tactical choices]; *People v. Floyd* (1970) 1 Cal.3d 694,710, disapproved on other grounds by *People* v. *Wheeler* (1978) 22 Cal.3d 258,287, tn. 36 [ineffective assistance of counsel not established merely by showing defense counsel failed to interview and call all available witnesses]; *People* v. *Knight* (1987) 194 Cal.App.3d 337,345 ["choice of which, and how many, potential witnesses to interview or call to trial is precisely the type of choice which should not be subject to review by an appellate

court"].) "Although trial counsel clearly has a duty to adequately investigate possible defenses to enable formulation of an informed trial strategy [citation], we will not presume from a silent record that counsel failed in this duty. [Citation.]" *(People* v. *Jennings* (1991) 53 Cal.3d 334,375.) "In some cases. ..the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affinned on appeal. [Citation.] Otherwise, appellate courts would become engaged 'in the perilous process of second-guessing.' " *(People* v. *Pope* (1979) 23 Cal.3d 412,426, fn. omitted.)

Ayon argues there could be no satisfactory explanation here because these "witness' exculpatory testimony went to the core of appellant's defense" -i.e., that he was innocently at the house and had nothing to do with any drug operation that may have been going on there. But according to Ayon, these five men had already pled guilty and been sentenced by the time he came to trial. This fact undermined their credibility because it meant they had nothing to lose by falsely exonerating Ayon. (See *People v. Frierson* (1991) 53 Cal.3d 730,745-746 [admission of killing 14 years later was insufficiently trustworthy to qualify as statement

against interest under Evidence Code section 1230 where declarant, who knew defendant had already been convicted, could have merely "wanted to aid his friend at little risk to himself "].)

The trial court noted there was no indication counsel had been unaware of these witnesses or of what they would have purportedly testified to. Ayon points to nothing in the record that would rebut the presumption trial counsel's failure to interview these men was a reasonable tactical decision. (See *People* v. *Montiel* (1993) 5 Cal.4th 877,911 [failing to use peremptory challenge against particular juror could not be basis for ineffective assistance of counsel claim on appeal]; *People* v. *Tuilaepa* (1992) 4 Cal.4th 569,587 [nothing in record indicated counsel lacked plausible tactical reason for not trying *to* rehabilitate prospective jurors who seemed predisposed against death penalty].)

6. *Resentencing was beyond trial court's jurisdiction.*

On March 9, 1998, Ayon was sentenced to state prison for a total of 32 years on count three, with the sentences on the other counts either stayed under section 654 or ordered to run concurrently. On March 13, 1998, the trial court purported to "recall [] this matter due *to* some sentencing confusion and what comes out in the computer program based on what it

was understood that I spoke on the record. So that being the problem, the court's going to resentence." The trial court also said it was acting pursuant to section 1170, subdivision (d). On April 3, 1998, the trial court announced it had "re-configured the amount of time that was actually available in this matter," and resentenced Ayon to a total of 35 years. Ayon contends this resentencing was improper and that the original sentence must be reinstated. The People agree.

"[A] valid sentence may *not* be *increased* after formal entry in the minutes." *(People v. Karaman* (1992) 4 Cal.4th 335,350.) "More than half a century ago our highest court instructed that '[i]fthe sentence has been entered in the minutes of the court, or if the defendant has begun serving said sentence or has been restrained by the sentence imposed, then the court is without jurisdiction to vacate, add to, or in any manner modify the sentence originally pronounced. On the other hand, if the sentence pronounced has not been entered by the clerk in his minutes, and no legal restraint has been imposed upon the defendant by reason of said sentence, then it is proper for the court to change the sentence originally pronounced.' *(People* v. *McAllister* (1940) 15 Cal.2d 519, 526-527....) The court subsequently explained that these principles 'were manifestly not intended to have the absurd and injurious consequence of precluding' a trial judge from timely

correction of either a slip of the tongue or an announcement of sentence which is based on a mistake of fact or law, which has not become of record in the minutes, and which has not affected the defendant.' (*People* v. *Thomas* (1959) 52 Cal.2d 521,534....)." (*People* v. *Kirkpatrick* (1991) 1 Cal.App.4th 538, 542-543.) Section 1170, subdivision (d), cited by the trial court, provides that a defendant may be resentenced within 120 days of commitment "provided the new sentence, if any, is no greater than the initial sentence."

Ayon's March 9, 1998, sentence was entered into the clerk's minutes. As a result, the resentencing was void, and the original sentence will be reimposed. [26]

*7. Trial court did not commit misconduct.*

Ayon contends the trial court committed misconduct by engaging in plea bargaining during trial and then becoming biased against Ayon when he insisted on continuing with the trial. This claim is meritless.

In the midst of presenting his case-in-chief, the prosecutor indicated he would accept a plea bargain that would result in a 23-year sentence. The prosecutor said that with Ayon's presentence credits and prison good

---

[26]Given this result, we need not address Ayon's claim the 35-year term violated the prohibition against multiple punishment.

conduct/good time credits, he would probably get out of prison in nine years, whereas if he were convicted at trial he was facing a possible sentence of 36 to 38 years, of which he would possibly have to serve up to 85 percent. The prosecutor outlined the evidence still to be presented. The trial court then said: "Everything that the prosecutor said was true. That the chances of you walking out of here if you're convicted are next to nothing. And with this kind of evidence, I mean, I can't get in the minds of the jurors, but they're no fools. If this evidence is what the prosecutor says it is, and I have every reason to believe it, you're basically a cooked goose. [¶] Nobody is putting any pressure on you, but we just want to let you know, and your lawyer understands the evidence that will be coming in, you're going to probably need to rebut it, it could raise itself to that magnitude for sway for a jury *[sic]*. So you have to think what you have to offer to rebut it. [¶] You may certainly have your trial, and we're in the middle of your trial."

A brief pause ensued, off the record, during which a plea agreement seemed to have been reached. Proceedings resumed and the trial court told Ayon certain protocol had to be followed to insure the agreement was honored. The prosecutor began the formalities of taking Ayon's plea. Ayon said he understood the charges and his rights. But when asked

if he gave up those rights, he did not respond. The trial court interrupted to ask if Ayon needed to speak with counsel. The prosecutor emphasized that Ayon must understand and give up his rights before a guilty plea could be entered. The trial court interrupted again and told Ayon to talk to his lawyer if he needed to. The court assured Ayon: "We want to make sure that you understand everything that's going on." After another recess, the trial resumed with the remainder of the People's case-in-chief. Based on these exchanges, Ayon argues: "The [trial] court engaged in plea bargaining. Once its entreaties to appellant to plead guilty failed, every ruling went against him, ensuring his conviction and increased punishment." He asserts that once he turned down the plea offer, the trial court "could not provide the appearance of impartiality," and that the court's bias was demonstrated when it incorrectly told him that a jury conviction "would cause him to serve 85% of36 years in prison." But the authority Ayon cites condemning " 'judicial plea bargaining' "was talking about situations in which a trial court forges a plea bargain over the prosecution's opposition. (See *People* v. *Orin* (1975) 13 Cal.3d 937,943, fn. 9.) The trial court here merely commented on the bargain being offered by the prosecution. Given these facts, we cannot agree the trial court lost the appearance of impartiality, particularly as the court emphasized several times that nobody wanted to pressure Ayon into pleading guilty

and that if he wanted to continue the trial it was his right to do so. As for the estimated time Ayon was facing, the trial court did not tell him that conviction at trial "would cause him to serve 85% of 36 years in prison." The prosecutor initially told Ayon: "[B]ased upon my calculations, you'll have to do possibly three quarters of it, based on the gun allegations." The trial court then said, "You'll have to do possibly up to 85 percent of that time," and the prosecutor then said, "Up to 85 percent, which means you may not be eligible for parole for 30 years. I may be wrong, but again, that [is] up to the parole board." Hence, Ayon was told only that he could"possibly" do this much time. If this estimate was incorrect -which Ayon asserts, but does not demonstrate -we still do not see that such an error constitutes judicial misconduct. Ayon has not shown anything more than a good faith mistake.

The only alleged effect of the trial-court' s bias is the assertion the court's rulings began to favor the prosecution. This is not the kind of evidence needed to demonstrate that a trial court has failed to remain impartial. '" "The misconduct of a trial judge which will warrant a reversal of the judgment should be so definite and apparent as to leave little doubt that it has resulted in depriving the accused of a fair and impartial trial.'" " *(People v. Walker* (1957) 150 Cal.App.2d 594, 605; see, e.g., *People* v. *Chong* (1999) 76 Cal.App.4th 232,244

[trial court's strong response to defense counsel's egregious misconduct did not constitute judicial misconduct "because the comments did not discredit the defense theory or create an impression that the court was allying itself with the prosecution"]; *People v. Kozel* (1982) 133 Cal.App.3d 507,521 [although trial court should not have spoken off the record about ongoing case, there was "no intemperate or inflammatory judicial statement" nor "any indication to the jury that the court had prejudged guilt"].)

## DISPOSITION

The resentencing of defendant is vacated and the original sentence of 32 years in prison is hereby reinstated. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:
CROSKEY, J.
KITCHING, J.

## AMENDMENT 5

**Criminal actions-Provisions concerning-Due process of law and just compensation clauses.**

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## AMENDMENT 6

**Rights of the accused.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to

be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**AMENDMENT 14**

**Section 1. Citizens of the United States.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

******

Sec. 5. Power to enforce amendment.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

---

## UNITED STATES CODE

**28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

******

**§ 2253. Appeal**

******

(c)(1) Unless a circuit justice or judge issues a certificate of appealability , an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

******

(2) A certificate of appealability may issue under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

**§ 2254. State custody; remedies in Federal courts**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in

custody pursuant to the judgment of the State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the Unites States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on-

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State's court determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual

determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section governed by section 30006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

---

## FEDERAL RULES OF APPELLATE PROCEDURE

**Rule 22. Habeas corpus and Section 2255 Proceedings**

**(a) Application for the Original Writ.** An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. the applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the

file of the district-court proceedings. If the district judje has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judge of the court of appeals.

******